UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA

IN RE:	.	Case No. 06-62966(PWB)
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INTERNATIONAL MANAGEMENT ASSOCIATES, LLC, et al.,	.	75 Spring Street SW Atlanta, Georgia 30303
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Debtors.	.	September 3, 2009 10:09 a.m.
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TRANSCRIPT OF HEARING
BEFORE HONORABLE PAUL W. BONAPFEL
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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For Gregory and Lawrence Cooper:	CATOSHA WOODS, ESQ.
	VALERIE PEOPLES, PRO SE

DEPUTY CLERK: Okay. We're here on the International Management Associates case, Case Number 09-00601, assigned number for the Trustee's For Value matters.

THE COURT: Parties ready to proceed?

UNIDENTIFIED SPEAKER: We are, Your Honor.

THE COURT: I've got a luncheon that I have to go to at 11:45 which is here in the building, so that's when we'll take out lunch break just so everybody is aware of that. Maybe we'll be finished by then. I don't know how long you all intend to take. So anyway, go ahead. Mr. Kaufman, are you going to start?

MR. KAUFMAN: Yes, I am.

THE COURT: Go ahead.

MR. KAUFMAN: Would you like appearances of counsel?

THE COURT: Sure.

MR. KAUFMAN: Mark Kaufman and Brian Bates both of McKenna Long & Aldridge on behalf of the Investors Committee. And also here on behalf of the Trustee to argue the matters of For Value. And also at the table today is Mr. Rick Bell who is with Trial Graphics who is here to assist in the presentation of our Power Point and sort of keep me from going astray.

THE COURT: Okay.

MR. BERNARDINO: Your Honor, Colin Bernardino, Kilpatrick Stockton, also on behalf of the Plan Trustee today. Although Mr. Kaufman will be I guess taking charge with the

argument.

MR. KAUFMAN: The Plan Trustee is also here, Mr. Perkins.

THE COURT: Okay.

MR. MUNGOVAN: Good morning, Your Honor. Timothy Mungovan from Nixon Peabody together with my colleagues Joshua Barlow and John Sablone. We represent the Laird's, David Laird, Debra Laird and the Laird Family Trust, the Curtis', Russell Curtis, Betty Curtis and the Russell Curtis Trust. We will be speaking on behalf of what we'll call the joint defense group for approximately half of the argument, Your Honor.

THE COURT: Okay.

MS. PASSYN: Your Honor, Juanita Passyn. We represent –- from Sutherland. We represent Keith Burks, James Shelton, Cornell Shelton and TBC Capital, Incorporation in five separate adversary proceedings, but today we'll be speaking -– I'll be speaking after Mr. Mungovan on behalf of the Joint Defense Group.

THE COURT: Okay, thank you.

MR. PHILLIPS: Good morning, Your Honor. Chris Phillips on behalf of the defendants David Wisneski and Michelle Peoples Wisneski. I expect to make a very short presentation regarding issues particular to my client.

THE COURT: Okay, thank you.

MR. SECRET: Akil Secret, Your Honor. I'm here on

behalf of George Wright and Kelsey Wright. And with the Court's permission I would simply join in the argument of the Joint Defense Group.

THE COURT: Okay, thank you.

MS. BROWN: Good morning, Your Honor. I'm Heather Brown. I represent defendant (indiscernible) Jeffries and I'm part of the Joint Defense Group and I do not anticipate making any additional argument today.

THE COURT: Okay, thank you.

MR. STEIN: Good morning, Your Honor. Kevin Stein. I represent Doctor Eric Randolph and Laverne Hamilton Jones. My clients are also part of this Joint Defense Group and I'll be joining in their argument today.

THE COURT: Okay, thank you.

MS. STEINFELD: Your Honor, for the record Shayna Steinfeld. I have defendants Renee Withers and Bruce Withers and I'm more here monitoring.

THE COURT: Okay, thank you.

MR. BAILEY: Good morning, Your Honor. I'm Greg Bailey for Mount Eagle Baptist Church and I'll be here monitoring, as well.

MS. PEOPLES: Good morning, Your Honor. I'm Valerie Peoples. I'm representing myself pro se. I'm a member of the Joint Defense team, as well as well as issues that are unique to myself regarding any other matters that arise during our

conversation. Thank you.

THE COURT: Okay, thank you.

MR. POWELL: Good morning, Your Honor. Jeff Powell. I'm here on behalf of Atlanta Perinatal Associates, Dexter Page, Brad Bootstaylor, Carol Brownee (phonetic), Cyrinthia Andrews and Alicia Walker. That's Adversary Proceeding Number 08-06185. And we are also part of the Joint Defense Group and will just be joining in the argument of defense counsel.

THE COURT: Okay, thank you.

MR. EASON: Good morning, Your Honor. Rod Eason on behalf of William T. Perkins, not to be confused with William F. Perkins. We may have comments. Quite frankly, we'd like to se exactly what's said and we reserve the right to just make comments sometime toward the end.

THE COURT: Okay, thank you.

MR. FAIN: Good morning, Judge. John Fain on behalf of -- excuse me -- Experts Investment Club LLC, also local counsel for Nixon Peabody.

THE COURT: Thank you.

MR. FAIN: Part of the Joint Defense Group, also. Sorry.

THE COURT: Okay.

DEPUTY CLERK: We've got a couple on the phone, but I don't know if they're just monitoring or want to be heard.

THE COURT: Well, let's find out who's on the phone.

MS. WOODS: Your Honor, Catosha Woods representing Gregory and Lawrence Hooper, and I'm also with the Joint defense Group.

MS. EVANS: And I'm Tara Evans with Epstein Becker & Green. We represent Marco Coleman and we're just monitoring today.

THE COURT: Okay, thank you. Okay anyone else?

(No audible response)

THE COURT: Go ahead.

MR. KAUFMAN: May it please the Court, let me just deal with a couple ground rules. I think we have an understanding with the Joint defense counsel as to how we're going to proceed, but essentially I'm going to make the arguments on the so-called For Value issue then as indicated Mr. Mungovan and his colleagues and the Sutherland Firm will then divide up -- and that's fine with us -- divide up their response argument, we'll make a reply.

There are some ancillary arguments. Mr. Woods -- Mr. Philips referred to that. And maybe some others have some other arguments that are not directly germane that are perhaps unique to one or others. If they're not covered by the comments that I make, in other words if they're not satisfied that we're not trying by today's matter to adjudicate anything specific that may be unique to a particular party or to address an issue, then obviously that can come up later. We'll have

that as sort of a followup round of discussion so that we stay sort of centered on the issues of For Value and whether that's a problem for the defendants or not. And then these other sort of side issues -- not to be pejorative about it -- can be addressed subsequently if necessary.

THE COURT: Well I'll just state generally, I'm not intending to resolve any issues other than the For Value motion.

MR. KAUFMAN: Right. And we're not intending to have it resolved so I think there's a harmony. There is, for example, one issue that some -- a couple of parties have raised, I think actually Mr. Philips has raised, about whether if For Value as the theory expressed by the Trustee doesn't work they'd like to get their profit back. It wasn't our intention that that be part of the motion. If Your Honor is not going to hear that today and is going to afford the parties the opportunity to brief that issue as if and when it were to be the case that we were not to prevail and they were -- those who are the defendants were actually going to seek to get back -- or to hold on to profit, as well. That could be for a separate day and a separate round.

THE COURT: Well I don't see the profit issue as being before the Court today.

MR. KAUFMAN: Okay. That is our view, as well. And so that --

THE COURT: If somebody else has a different view that it is I'm happy to take that up, but my understanding is that the motion is limited to whether or not the For Value defense is available with regard to the return principle.

MR. KAUFMAN: Right, that is the issue. All right, thank you, Your Honor. With that let me start –- and I'm going to use just an outline to keep myself sort of on focus as Your Honor ––

THE COURT: I guess I would make this observation, if it's not available for the return principle it would not be available for the amounts in excess.

MR. KAUFMAN: That is our view. In other words, if we prevail then ––

THE COURT: But the fact that it is not –– the fact that it is available for principle does not necessarily determine the issue on the excess amounts.

MR. KAUFMAN: Right. And we briefed it as such and basically said we think, in a way, it's for another day. And in part without prejudice to any of the parties on the other side since he whole matter hadn't been briefed by everybody I think that is for another day and it will be moot if we prevail, but if we don't prevail then it's ripe for a separate adjudication. Your Honor, you've known me for a long time so you know that I have one thing that I do do that will move this ahead which is I talk fast. On the other hand I think I would

be as neutral as I can to say that I'm not gifted in brevity. But that said, I will attempt to speed through this as fast as I can.

We have two volumes –- they're each the same -– of the matters. We've provided them to counsel, like 15 sets of them to as many as we could and maybe they can share, but these are one for the courtroom deputy and for Your Honor.

THE COURT: Let Ms. Harrow (phonetic) use the courtroom deputy one temporarily.

MR. KAUFMAN: Okay. We have an extra one, Your Honor, that -- Ms. Goss, would it be helpful.

THE COURT: Are you introducing this into evidence?

MR. KAUFMAN: No, this is a demonstrative.

THE COURT: Yes.

MR. KAUFMAN: All this is is demonstrative matters just to follow along and essentially --

THE COURT: Is it part of --

MR. KAUFMAN –- consistent with Local Rule all we're doing is we've provided this to everybody because there's -- anything I'm referring to that's going to be up on the screen is contained. This may over contain a bunch of stuff. Hopefully it does since I don't intend to show that many pages on the screen. But this is the volume from which materials come from.

THE COURT: Okay.

MR. KAUFMAN: All right.

THE COURT: That's fine. I guess my question is is this part of –- do you want this to be part of the record?

MR. KAUFMAN: To the extent Your Honor wants to refer to it.

THE COURT: I can refer to things without it being part of the record.

MR. KAUFMAN: Right. So I don't think it is part of the record.

THE COURT: The question is –- and it doesn't look like there's anything here that's not part of the record except the Power Point presentation.

MR. KAUFMAN: Yes. The Power Point presentation and some cause authorities.

THE COURT: Because all of these --

MR. KAUFMAN: There are a couple of case authorities in there, but –- and you know, obviously the Court has the ability to look. So this is just a handy reference tool.

THE COURT: But all the subscription agreements, those are already part of the record, right?

MR. KAUFMAN: That's correct. These are just examples of them just to illustrate a point or two.

THE COURT: Okay.

MR. KAUFMAN: Okay.

THE COURT: So when you take it up on appeal you can

reproduce whatever part of this or other parties can as appropriate.

MR. KAUFMAN: Correct.

THE COURT: Okay.

MR. KAUFMAN: I hope you don't mean when -- when one takes it up on appeal.

THE COURT: Well, I'm assuming it's going up by somebody or the other.

MR. KAUFMAN: Right. I wasn't reading anything more into it than that for now. Your Honor, let me go over the outline very briefly where going and I think that will sort of keep us on track. I want to talk first about the events and decisions that preceded the motion. There was obviously a history of this case for a couple years that preceded where we are today and I want to briefly highlight that because I think it forms an appropriate backdrop.

Second, I want to talk very briefly about what it is –- and I think the Court well understands the goal of what we're saying and sort of the thrust of the relief we're seeking. Third, I'm going to briefly review the appropriate statutory framework. I'm going to talk about the fact that the IMA investors indeed were by the documents that they signed equity holders. There may be a couple, not for today, that have unique circumstances, but the bulk of the people and I think virtually all the people here signed those agreements and

I think are bound by the fact that they signed them as equity.

Fifth, I want to talk about the Ponzi scheme -- outside of the Ponzi scheme how courts deal with distributions to equity holders that are not ratable. Then I'm going to compare that in the next section that what happens in the conventional Ponzi scheme case where there's a fraudulent transfer and why those cases don't apply in the history of -- or what we call the lore -- don't apply to the Ponzi scheme case and that the Ponzi scheme cases are essentially replicating what happens in the non Ponzi scheme cases and shouldn't be dealt with differently.

The crux of the argument is going to be the seventh point which is we're going to refer to law that's applicable both from the Bankruptcy Code and from common law principles, whether they are due process principles or equity debt distinctions under state law, and demonstrate that the totality of all that red can't lead to the result that the defendants would argue that they can justify the For Value defense under these circumstances.

And then finally the eighth point, I'm going to rejoin the notion that somehow the contention that the Trustee is quixotic arguing on the one hand that the parties who are tort victims are creditors and on the other hand equity holders and that somehow or never the twain and that we're somehow either as a matter of res judicata precluded which I think is

not a fair at all read of what we did in the explicitness. But second and to the point, the fact that the parties are at one time equity doesn't preclude their being treated as creditors today for purposes of satisfying any requirement that there exists creditors, be that under More v. Bay, Whiteford Plastics or the General Notions of Insolvency under 548(b) with regard to a constructive fraud.

So with that let me turn to the history and say that –- to quote I think Crosby Stills & Nash if I'm right, "it's been a long time coming." We started this in 2006 with the formation of an investors committee and soon thereafter recognized that there were indeed issues about whether the treatment that had been accorded to some of the people who had been victims of Mr. Wright's Ponzi were sitting with a bag full of -- getting their money back fortuitously, not through fault of theirs, while others were sitting empty-handed and those were primarily the people on our committee.

Now there were people on the committee that were sort of -– not pejoratively again -- hydro headed in the sense that they had gotten some of their money back and not the bulk of their money back. And we basically had to form a sub committee and it got into sort of a protracted matter and don't need to recite it here. But we dealt with the U.S. Trustee to make sure that we had a neutral committee of people who were simply investors who hadn't gotten their money back so that they could

make a determination of what to do because the parties who had gotten some of their money back below the "high water mark" which was the measure had a potential claim against them and obviously couldn't participate in that process.

So ultimately we reached that point and ever since reaching that point have been moving toward the day that we'd be here arguing that there ought to be a ratable distribution and that we needed to rescramble the egg, if you will, and be Robin Hood in the sense of taking from some who had gotten and giving it to those who had not. When we face that we obviously recognize and recognize today that this is not a happy situation for anybody and quite frankly it's with that in mind that we came up with the idea of the plan.

It all depends –- and this is the part where I'll leave the law for a minute and just reflect on this because I've talked about it to umpteen people, whether involved in this case or not, and you obviously come away with the notion of why are you not letting sleeping dogs lie and then on the other hand if you're there amongst a group of people who have lost their money they're saying why if I invested this equity do I not get my money back when the guy next door serendipitously got his or her money back.

And so you can look at it and say well depending on which perspective you come from both of them have right feelings. You can then get into the question of am I my

brother's keeper, should I go about trying to make things even or am I out there to protect me and my family and that's right. You can do all those debates, and we did all those debates, but at the end of the day the question is is there law that ought to order what otherwise are moral or philosophical judgments or prospective judgments and harmonize them somehow. And when we went to look I found that the law in the area of equity cases as opposed to debt Ponzi scheme cases was virtually nonexistent and therefore –- and then looked at the whole body of equity law and found that equity law as I had always learned it talks about ratability, a totally different concept than creditor status.

So it was with that that we proceeded ahead and as we did we concluded that indeed we had a very meaningful case and one that as a fiduciary we had to bring. So that then led to the plan. The plan was an effort to say listen, this is an unsettled area. Admittedly we think we are right, admittedly we think that the other aside doesn't have a compelling argument as to why the so-called transmutation of their claim -– of their equity into debt can work, but recognizing it was uncertain and recognizing that we were causing a change, a dynamic change, in a way no different than the change that was wrought on those who've had nothing when they woke up one day to realize they had nothing we were going to have to go in and resort and redivi if we were correct.

And so we said listen, we'll provide a plan that allows people to get out before Your Honor turns a card, and that's exactly what the plan was about. It was volitional. It didn't mandate that people did it. It just gave them an opportunity to say if they didn't want to walk the plank and take the chance that they win or lose they could get out and they could get out for ten cents on the dollar and a nominal basis. When I say nominal I don't mean ten percent was nominal in its percentage. That was the amount that they had to disgorge of what they had gotten below their high water mark. But on the other hand while that was the amount that they had to give up they were also relegated on the distribution such that they wouldn't start receiving money until the distributions got down to the percentage of what the size of their claim was. So it had a aggregating effect and would actually have more impact than merely ten percent.

We went through all the math of that. That was the formula. We've settled. We've now settled for roughly about $3 million, most of which has been collected. There's another 20 or 25 million of people who chose not to and they're the defendants before the Court today. But to the extent the Trustee was saddled with the issue is this fair, the investor committee salvaged whether it is fair, we acquitted the fairness issue as best we could in that fashion and now we're proceeding with the law as we think it is. So that's the first

point.

Then what I wanted to also say is we are not obviously dealing with other issues as Your Honor alluded to. We're not dealing with a statute of limitations here today, we're not dealing with good faith. Indeed this whole proceeding was intended to avoid any issues of good faith that would obviously have to be decided on what each individual knew and would lead to a protraction of proceedings. And we are obviously desirous of circumventing this is the For Value wasn't going to be available because, as we'll get into in the statute, you have to satisfy both in order to have a t548 defense.

Today is also not the day where we're dealing with whether this is a Ponzi scheme. I think the defendants are entitled to a day in court if they want to. It's in a way sort of if they got their money back because they're asserting there was a fraud I don't know how they're going to argue that there wasn't a Ponzi scheme. But be that as it may, that's the burden that the Trustee has. It is for another day. We're assuming it to be the case for argument, but it's subject to the rights of the parties to want to challenge that and when it started. And that again for another day.

So the purpose. The purpose today obviously is to look at getting this equal treatment among what we think are defrauded equity investors and they best way we can. To the

extent people pay back in then they'll have claims, to the extent they don't then we'll need the assistance of this Court to figure out what we do about those who aren't going to pay in terms of either putting them completely out or way down under -- in an appropriate way under any distribution right, but presumptively if people have, we're going to want to enforce the claims and recover it and use it to distribute to all people pursuant to the plan on a ratable basis which is what the plan provides.

So that part is pretty simple and straightforward, which takes us to -– well I should say the thrust of the argument today is that the exchange made at the time the parties got their money back in exchange for giving back their certificate wasn't reasonably equivalent in value; and second that they can't use the legal fiction that it was in satisfaction of a tort claim that they say arises -- and we're not disputing it arises -- at the time that they first invested. And we'll come back to that and why that is the fact that we're acknowledging that there is a claim that arises when it did doesn't change the operative result that we're seeking.

So we start –- let's look now at the statutory framework, which is pretty simple, and I'm sure that we can run through this pretty quickly because the Court is fully ware of this having been at this for as long I think as I have and these are not much in debate. So we have an actual fraudulent

conveyance. I'm not going to spend time today dealing with constructive fraud. It requires obviously the insolvency and the value issue which is imbedded here on the defense side, as well, so it's essentially the same issue as other courts have found.

But we need only deal with the actual fraud because I think the Ponzi scheme is unassailable that there was an actual intent. The cases say Ponzis are presumptively actual intent to delay, hinder and defraud, both under you'll see the 548(a)(1) Federal Law which now is two years, but at the time was applicable for one and under the strong-arm clause through the UFTA adopted in 2002, same language and we have a four year statute, but it's told due to non knowledge so we get into another day the statute of limitations and how far back we can look. But those are the actual fraud provisions.

And then we turn to what's the defense and we obviously know that the operative defense is found in 548(c), transferee takes For Value and conjunctive in good faith. And I don't think there's any question but that conjunctive needs to be satisfied. we park to another day if necessary the issue of good faith so we're here on the question of value.

And then finally where the nub of the issue is going to center 548(d)(2)(a) describes the notion of value and it means either property, which has always been determined to mean reasonable equivalence in value, or -- and here's the rub in

the nub of today's case –- satisfaction or securing of a present or antecedent debt. And what the contention is on behalf of the defendants is that when they got their money back it was in satisfaction of a unarticulated, but nevertheless extant antecedent debt of the debtor and therefore value is satisfied even though what they gave back was not reasonably equivalent. All right. With that we obviously are going to look at the issue of value exchange at the time of redemption. I don't think there's any question --

THE COURT: Well, let me ask you this because your Power Point raises the question and I wonder.

MR. KAUFMAN: Sure.

THE COURT: Is the -- the same issue exists under the Georgia Law, right?

MR. KAUFMAN: Yes. I mean to say that. Correct, Your Honor.

THE COURT: Is it the same issue?

MR. KAUFMAN: Exactly the same issue. No different.

THE COURT: Does Georgia Law govern both of those issues?

MR. KAUFMAN: Does Georgia Law govern both --

THE COURT: The value issue, this issue right here.

MR. KAUFMAN: Well federal law would govern to the extent you have a fraudulent conveyance in the first year. Georgia Law would govern any of the strong-arm look backs. So

we're looking at the same language. And by the way, there's ample case law that says when the language in the state statute is in the same words as in the Bankruptcy Code the federal precedents in the bankruptcy area interpreting the same language is applicable. So I think the whole body of case law that we're talking about is going to apply one way or the other here, whether we're looking at this For Value as a state law matter or a federal law matter.

And we found nothing in the Georgia State Law on this point that -- you know, while fascinating to us it's probably been obscured over history otherwise. So the issue of -- which is not the issue of reasonable equivalence in value or whether value means for and on account of property or antecedent debt, but rather whether there are any cases that deal with this transmutation without articulation, so to speak, which is what we're talking about.

So we look now at the time of the redemption. We're not -- obviously at the time of the original transaction there was monies paid and they got share certificates either from the limited partnership or the limited liability company, but we're looking at the time of the redemption as the central focal point. And it's also clear that you can't make the argument that well here's my share certificate that I got when I gave you my $1 million so I'm giving it back, give me back my $1 million. You have to look at the value of the certificate at

the time and if the shares are essentially worthless the fact that you're handing bac the certificate is a value by any, you know, stretch or any case law that would support that proposition.

So the next question is are we dealing with equity. We need to cover that and satisfy that this is equity because if they were creditors to begin with then they would have an antecedent debt from the get go and we wouldn't be here making this argument. I might add as an aside -- and I think this is relevant -- I do not think that in the Madoff case and in Stanford that the investments -- and while we haven't heard this argument as sort of an explanation of why, we're equity investments. You know, ever situation is different. I had thought that perhaps Madoff and Stanford were going to be like this. There are a host of other Ponzi scheme cases that were structured intentionally as equity. The Madoff and Stanford were not.

The results in those case may be different because those people basically set up demand deposit accounts, if you will. In our case it was equity. In other cases it's equity. And a lot of the hedge fund cases were set up -- a lot of hedge funds, not cases -- but in a lot of hedge funds the structure of those deals was set up as limited partner or limited liability investments. That's because what the hedge fund managers didn't want to do was have the risk of being thrown

into bankruptcy by creditors so they made them equity holders and limited partners don't have the rights. So absent getting some independent fiduciary to come in and take over the estate the ability for unhappy investors who are equity to get in and do anything about it is problematic. And that was in my view clearly a design focus of these hedge funds to begin with. And in our case specifically this was set up that way.

So let me just be brief about it because I don't want to go at long length. But I don't think there's any question when one looks at the subscription agreement, the offering memorandum or the actual documents that were signed. This is in the subscription agreement, new limited partner desires to become a limited partner. Okay that's one example. The next is -- we're going to go fast here -- in the subscription materials purchasing a membership interest -- I'm dealing with -- I'm going to deal with these in the membership. Some of these were LLCs and others were LPs, virtually the same language. All of the people who subscribed subscribed to one of the other. Why IMA set some of them up as LLLCs and LCs(sic) that's committed to somebody else's history, I don't know. But they were all set up one way or the other as equity investments.

Okay, next is the offering memorandum talks about membership interests. It's a limited liability company. Next is investments in limited partnerships. This is partnership

agreement. This is in the offering memorandum in that one. And then we get to the actual documents -- this is the offering -- actually in that same document, as well, offering limited partnership interest. We turn then to I think the actual agreements themselves. This is part of the actual subscription agreement. It's the LLC agreement, excuse me. Member means person that has entered into a subscription agreement that is accepted by the manager and is named a member of the company in its books.

Capital contribution. Obviously that doesn't happen in a debt situation. They're doing that. And then beneficial membership interest in the company. This is in units in the LLC. Each unit shall be identical in all respects with ever other unit. Undivided beneficial interest in the company. None shall have priority. And then allocations in proportion to their capital accounts. These are all standard provisions that talk, walk and look like equity. Next -- and here significantly in the liquidation context -- the proceeds of liquidation shall be distributed first to creditors, then on a ratable basis to members in proportion.

So that's what they signed, that's what they're bound by and that's what distinguishes this case from cases which are debt. So with equity nature having been established I want to look next to the non Ponzi scheme scenario, in other words a scenario where under stats law without any inceptive fraud

having been committed by the party who gathers the capital into the estate there's a distribution that's made. So we're going to talk about this outside the Ponzi scheme situation. And I'm going to talk about a hypothetical which we have on the board here and that's in the materials.

Let's assume we have ten people who become equal equity members of a limited liability company, each contributes a million dollars so there's $10 million of total paid in capital and the fair market vale of that at the time the company hasn't started is $10 million. Everybody owns one-tenth -- obviously this is tautological -- and have $1 million each. All right. Then over a period of time due to operations and whatever the LLC still has net equity value, you know, on some kind of enterprise basis it's valued, and it's still on the particular day in question, nevertheless has declined such that the fair market value of the company properly determined through appropriate valuation is $3 million.

Each member share obviously would then be worth $300,000, but on a particular occasion one member without any fraud on its part -- and let's presume whether there's a badge of fraud in the transaction or not doesn't matter -- one member comes in and says listen, I really got some need for some money, please give me my million dollars back and the principal of the company gives them back their $1 million.

Here's the operative point. Even without considering fraudulent conveyance law 700,000 of that transfer would be actionable under limited liability law, limited partnership law, corporate law, all of those, as an unlawful non-ratable distribution because it violates the notion that's inherent as you saw in the LLC and LP documents themselves and essentially absent some special provision to the contrary in those documents or in corporate law documents means that everybody is entitled to ratable distributions.

That's why you see valuation provisions often in closely held corporations so if somebody's going to get out they have to go through a proper means of trying to determine how much their shares are worth at that particular point in time. And it has nothing to do with the notions that there's been any kind of fraudulent action vis-a-vis the original transaction that gave rise to it. It's simply the fact that there's an unlawful distribution and you can set it aside. State law is to that effect. We listed it in our brief. And it's been held that way for, you know, essentially our whole history.

Indeed the whole notion, the dichotomy between equity and debt is essentially premised on this whole notion that equity gets ratable distributions whereas creditors short of being ain a fraud case where the have good faith problems or in a preference period can get preferred. So that outside the

preference period if I have no reason that there's a fraud that's been committed go pester the heck out of my obligee to pay me back and I get paid before the next guy, that's the way the system works and that's because there's a right, there's an obligation due, there's a contractual commitment to repay something, whereas an equity is an interest in, not an obligation owed by.

And that's the fundamental distinction and that's been part of our business jurisprudential history for as long as the United States has been here and I believe that comes from principles that go back to common law in England. It's not challengeable. And when in fact these issues such as this arise the result is you disgorge the amount that was an unlawful transfer. And there's a host of litigation about such kinds of matters.

So if you then say so what's the difference we go back to our outline, our general outline, what's the difference between this Ponzi scheme -- excuse me, this non Ponzi scheme case -- can you g back to five -- so we've handled that. Outside the Ponzi scheme case is what we just talked about. Hit the next one, please. So the question is in a conventional Ponzi scheme case in the fraudulent transfer context, is that any different than here. And what we're going to talk about is the inapplicability of some of the case law that has arisen and why it doesn't apply. But what we're saying here is is there a

difference between the case that I outline where there's ben no inceptive fraud versus the circumstance which we're presented with in a Ponzi scheme case where there has been. Okay.

And what I want to talk about there is 548(d) as we're going into it. We're going to return to value and the definition of value says for anon account of an antecedent debt or something that is reasonable equivalent in value. So the question here is since we know that in a hypothetical case and one that we're going to go over in a second there isn't reasonable equivalence in value how do you get around that and justify that the equity holder in the circumstances where there was inceptive fraud gets to keep unlike the non Ponzi scheme case that we just described that comes out where there has to be a disgorgement.

So let's take an initial transaction where there's a hypothetical equity investor investing $500,000 and received 500 shares at a thousand dollars per share par value, okay. Now let's go to a redemption transaction. And we're going to distinguish on the one hand what the investors who are out there in the public think are happening at the time they're getting their money back and compare that to what the actual facts are. What the investor thinks and what the public thinks at the time is that there was a hundred million dollars of investment. That's not in the hypothetical, but let's assume that that's the aggregate amount of assets that were put in and

that's what investors believe was the amount that had been contributed based upon public reports from the Ponzi scheme entity.

The actual facts are that the company is living hand to mouth and essentially the new money is simply paying people who are demanding to get their money back and it's marginally keeping afloat until like the days that led to IMA's demise and Madoff and Stanford and everything else is where the money coming in was to short to keep up with the money that was demanded because there was an increase in need to get money back out through nothing other than macroeconomic forces outside of the Ponzi scheme which led people to make a demand.

So in this hypothetical case there are a hundred thousand shares at this par value of a thousand dollars and the actual fact is there are a hundred thousand shares, but the company is only worth -- it shouldn't say par value because it's not the issuance, but it should just say the value of the shares are really now only $10, not a thousand. Let's assume this $500,000 obviously is what the investor thinks was their equity position and aside from any profit that's what they have in the deal. The actual value unfortunately is only $5,000, one percent. And that follows obviously from the fact that in the aggregate everything is only worth one percent of what it was originally worth and the company is basically robbing Peter to pay Paul, getting new money in to pay the -- you know, in a

classic Ponzi scheme keeping the matter afloat.

Let's assume the party redeems 250 shares at the published 1,000 per share price because they come in and say I need my money and Kirk Wright -- turning to our case -- says okay, well if I don't pay them, you know, this is going to be a deck of cards falling so I'll pay the $250,000, when in fact those shares are worth $2,500. And we have a classic situation where there is not an exchange for value.

So the answer to all of this is well there's an expedient, enter Ebby (phonetic). And the line of cases that appear to be the salvation which somehow say I'm going to circumvent this problem that clearly there's no reasonable equivalence in value and get around the traditional case that says equity has to be distributed ratably by taking the position that the problem is solved by the fact that I happen to have had a tort claim that arose at the time I got into this deal and it is that tort claim that I'm going to rely upon to say that's what I got my money back for, it's for on account of that antecedent debt not in respect of my equity interest that I got my money. Cleansed antecedent debt, presto-chango happens and this whole thing works out and there's no problem and the reliance is on the case called Ebby and to so-called seminal case.

I got to say that when I started looking at this I went and expected there was going to be this comprehensive

analysis in Ebby about how they can get to the point -- getting a little ahead of me here, but -- how they can get to the point of saying that this Ebby case stands for the proposition that they've thoroughly and exhaustively looked at this notion of transmuting a claim from debt to equity or equity to debt and went through an analysis as to how that got justified. But if you look at the Ebby case -- which interestingly isn't a case about principle, it happens to be a case about profit -- what happened is Ebby got back $4,500 on a $3,000 investment and the trustee in that case was looking to get back the $1,500 as profit.

In the context of that -- and now we can go to the section -- and here is the entire paragraph that we're talking about on the right side of the page -- it is not claimed that the payment of 1,500 to Ashley should be returned as a preference for as we've already said at the time it was paid Ashley had no reason to suppose Young to be insolvent. Okay, forget that because that's really not relevant. How then should this payment of 15 be disposed of? At the time it was made Young owed Ashley 3,000 for money actually paid to him which Ashley had a right to recover from him from the moment that he was deceived into paying it. And then it goes on and says but he can't keep the 1,500. That sentence at the time it was made owed to Ashley which Ashley had a right to recover from the moment that he was deceived into paying it is the

logic of supposedly transmutation.

There is nothing more in that case about it. There is no analysis as to why that's fair, right, conforms to state, federal law, bankruptcy principles or anything else, no notion about the fact that it hadn't been articulated by anybody, nothing. It's just that sentence arising really in a dicta because it was unnecessary. And in a way it's not surprising that the Ebby court didn't get into this because it was surplusage. As we point out in our brief this was the first of the classic set of a long line of what we call claim squared cases, situations where the original investment wasn't equity, it was debt, and therefore surplusage to be able to say that by the way they absolutely also had a right of recision or restitution from the moment they were deceived. And all that is is to say well they had a claim and now they got another version of claim, but it's not to transmute an equity into a debt which is a fundamentally different dog. Okay, that's Ebby.

And if you look -- and I'm not going to belabor it here because the cases are considerable, but the interesting thing about all the cases is they cite Ebby for the proposition that there is a notion of letting the equity holder -- or excuse me -- of letting the investor get back their principle on the basis of having a tort claim period without any discussion. Not one of the cases examines any of the issues

presented here today. Not one of the cases looks at and analyzes any problem of failure of any articulation. None of them examine anything. They simply cite to Ebby and then cite to the subsequent cases that cited Ebby and I found not one singular bit of analysis of any of that.

And as it turns out they all arise in a situation where it's claim squared until a couple cases come up in the late 2007/2008 era. So not only are they devoid of analysis not dealing with any of the issues here, they're really inapposite because they are claim squared cases so the mere fact that you got a second claim there's no reason to get into a hullabaloo about transmuting something that is inherently equity into debt.

So then we enter into looking at what happens at the time of this equity redemption. And I want to just highlight, there's no articulation of a tort claim b the party who is coming in seeking redemption. They don't ask for a recision. They don't have any knowledge of the fraud. And one of the things I'll come back to point out is if they had knowledge of the fraud to be able to mouth hey I got defrauded they'd be out under 548(c) good faith right out of the box.

So in essence this convoluted notion of transmuting without any articulation flies directly in the face of the circumstance of 548(c) and is basically an end around that which would be if that were happening in the bankruptcy context

would be precluded. There's been no lawsuit filed. There's no due process. There's no -- actually one of the interesting things is you don't have the defendant entity either: (a)acknowledging that there's been a tort or compromising it based upon a tort. There's no notice of a claim in an open forum. And that's one of the important things because our jurisprudential system is predicated on the notion that if Mr. Bates here were to make a claim against IMA and it got into the news or for that matter simply as a matter of public accounting or accounting that has to be done correctly, some audited reports, he got paid a certain amount of money it would reflect in the books and records of the company or in court and other people would understand that and there would be an opportunity to say wait a second, there's a problem here and everybody would be in there and we'd stop the run on the company, stop it hemorrhaging whatever cash it has, stop it from continuing on the Ponzi scheme.

But we have none of that because this is all an invention. It's a legal fiction. And there's no proof of any of the claim or damages. Ironically we're here because they want to say was there a Ponzi scheme, but you know without articulation obviously nobody is thinking about saying gee, I have -- here's what happened and Kirk Wright you were guilty of deceiving me and the whole panoply of proof that would be required totally devoid. And so this is what I call the

transmutation without articulation is absurdity or fallacy or whatever you want to and, you know, hit me over the head for being cute about using that term.

But I think it -- when I first looked at it this whole transmutation without articulation, whatever you want to characterize, is exactly the nub of the issue. That is the centerpiece of this problem. And getting around it is the question because if they can get around that and that could be justified then they have antecedent debt, voila they're satisfied. If they can't then the issue is -- or then the result is that there is a right to get the money back because they can't satisfy For Value. So it turns on that.

So what I want to do is now come to the nub of the argument which is Section 7, which I guess we don't need to go back to, but it is essentially what's wrong with the transmutation without articulation principle. And I want to talk about that. One and two are points we've made already. One is the distinction between debt and equity and the ratable treatment principles applicable to equity that we talked about that are in the embodiment under state law. Second, it disregards the distinctions in the Bankruptcy Code itself. Claims and interest are obviously vastly different.

And, you know, Your Honor has been through this, you know, many, many years and knows that it's pervasive through the Code that there are fundamental differences between the

treatment of claims and interest and that interests are always subordinate to the treatment of claims. And so this runs afoul of it to simply with a flick of a wrist, you know, go back and, you know, in some ledger domain way say well this is just -- you know I want it to be this so it's expedient and I'll let it be this because in doing so you're basically adversely affecting the parties who didn't get money back on total contrivance that the other people actually went in and had these claims.

All right, so now we get to what I'll call the ignoring the requirements that the claims to be articulated. We went through all of the due process principles. And I would say also, if you were ever going to in a bankruptcy context make a claim that you wanted to change what you were from a equity to debt you need to use a whole procedure. It's not even a contested matter unless the parties are going to stipulate to it like we did in a plan. You need -- if you're going to make that argument you need to bring that as an adversary proceeding, give notice. Anybody who's got standing under 1109 can come in and be heard. There's a whole procedure. Here there's not even an articulation let alone a suit or a claim or a notice.

And then finally and what I want to get to here is there are a host of provisions under the Bankruptcy Code that I think are offended by this concept. And the crafters of the

Code obviously contemplated in there various provisions we're going to get to a set of principles that ought to be guidance. To strain to find transmutation without articulation to be viable you have to get satisfied somehow that these other principles that inhere in our system of jurisprudence in the bankruptcy area are not meant to constrain this articulation without -- this non articulated transmutation. And I submit these provisions go very strongly whether this case is in bankruptcy at the time of those payments or not to basically say this casts a serious doubt on whether or not any of that non articulated transmutation can pass muster when you look at it in context of the Bankruptcy Code.

And I start first with 510(b) because I think it's the most relevant of these factors. By the way, I meant to mention as a brief aside the Bayou case in one of its decisions actually held that where you didn't articulate in that case interest that the court said that that -- you can't have transmutation without there being articulation. You can't say gee, the profit you thought you got -- and this is cited in our papers -- the profit you thought you got you're now going to try to justify as interest on your antecedent fraud claim, you never articulated it and therefore there's no legitimate right for you to try to now characterize it as such. And that case cite is in our materials. And that's the closet thing I could find to somebody trying to make that argument in an equity

context.

So 510(b). We know that this arose as a result of -- there was a case decided I think in the Second Circuit right before the 78 Act that basically took this position and said you can't jump up and get something better by transmuting yourself from debt to equity. When I looked at this clause in the context of this matter I realized that there's more teeth in 510(b) then I ever even imagined when I started studying it because it basically says that unless you've got common stock -- and let's call ourselves that -- you don't even have -- if you transmute from equity to debt you don't even step up to being equal to the creditor that you were trying to get -- the very creditors you were trying to get ahead of. Indeed you're subordinate to other equity.

The only place you're on a parity, meaning he whole exercise is for naught and it gets you nowhere, is if you had common stock before -- call that these limited partnership interests because there are no other levels of equity in these matters -- and then if you prevail you get no higher treatment or different treatment than everybody else who is still equity. So you go say hey, I'm transmuting from creditor status or equity status to claim status by reason of my claim. And 510(b) says well that's all a nice exercise, but it's essentially a worthless exercise. And unfortunately the result is that this transmutation principle that is without

articulation is letting the very thing that 510(b) would proscribe to happen.

Now, one of the interesting things is let's look at just what would happen if the decision happened quietly and Kirk Wright and the investor had a discussion and signed papers two months before his bankruptcy or the bankruptcy of IMA and said I hereby acknowledge that you have a tort claim in the amount of the original principle because I defrauded you, signed Kirk Wright. That claim wouldn't be treated any differently when it came time to divi up than the person who held the $1 million stock and is owed $1 million. They're on equal footing.

So the fact that somebody got paid earlier than the bankruptcy shouldn't mean anything different. Go back and disgorge it. So 510(b) I think is a pretty compelling reason why in and of itself the transmutation principle that would give rise to a completely opposite result from what 510(b) is intended basically says that can't be used and that the contrivance of the non articulation shouldn't work.

Next 548(c). We talked about this briefly before. You cant collect if you have a belief that something is awry. We know that. And so the assumption is that when you have this claim you've had to assert it because if you don't have -- you haven't asserted it then why is there a claim. And so the parties on the defense side here in a sense get caught because

they want to say well I had a fraud claim from the inception. But if they had it to a point where they could have said anything about it they wouldn't be operated in good faith.

And so in essence this transmutation is an effort to basically undermine the whole notion of good faith because it's premised on contrivance of hey I really didn't know to get around the good faith problem when in fact good faith is part of the whole notion in the Code and is designed basically as a means of saying one party ought not to get a head of another in any unfair way. If I'm going to let this good faith get satisfied by the contrivance then I've basically emasculated and taken out the good requirement under 548 and the transmutation notion is undermined by allowing this good faith principle to work.

And finally, we have a series of provisions relating to the plan in both 1123, which requires that treatment for claims of a particular class absent agreement are supposed to be on the same level, and then obviously in 1129 you have you can't discriminate unfairly which means giving disparate treatment to people of a same situation. And what have we here. I mean we have a situation where Mr. Bates and I live next door to one another. I've got my million dollars back, he hasn't. We're both victims of the same fraud on the same day. I just happened to get my money back, he didn't. And we're getting totally dissimilar treatment simply because I got my

money back earlier. And the whole notion is I didn't get it back as equity, I got it back in this contrivance that it was for an antecedent debt.

So, Your Honor, the whole thing as you can tell centered on the notion that this transmutation principle ought not work and because it offends principles of common law, principles of debt and equity distinction, principles that say equity must be distributed ratably and a host of bankruptcy principles that I think are offended by any notion of trying to reach t his contrivance in the context of equity.

And now finally let me just turn in the last few minutes to the issues that are raised by the last section, eight. Can you go to eight. Mr. bates is trying to tell me something. One second, Your Honor.

(Pause)

MR. KAUFMAN: Mr. Bates reminds me that I have forgotten to mention the recent cases that have arisen that shed light on this and he's most correct and I appreciate that. There have been two recent decisions that have talked about equity and they came up one in 2008, Ninth Circuit decision in AFI, and then preceding that a decision from the Montgomery Alabama Bankruptcy Court Judge Sawyer in the Terry case.

Let me deal with AFI first. AFI is a case in the Ninth Circuit that tried to harmonize two prior cases. In essence the two prior cases brought up the very concept that

we're dealing with here. One involved a situation where there was no inceptive fraud, held disgorge the money, unequal equity. The other was a case that may have looked like -- though it arose not in an equity case, arose in a situation where there was inceptive -- yeah, I think did arise in an equity case and arose in a situation where there was a return of equity and the court looked at that case and said well this one holds that you can get your money back.

And how do we harmonize it. The court in AFI, if we go to the relevant language -- go to the sentence above where it says the trustee argues -- the trustee argues that the parties did not expressly exchange the restitution claim for the 89,000 and instead AFI transferred the money on account of a partnership interest. That's the -- there it is. There's the classic argument that this was in exchange for a partnership interest.

The court then says although circumstances of the exchange were cloaked in terms of a partnership interest just as ours we delved beyond the form to the substance of the transaction. Now their delving -- and I must say without being indelicate -- isn't much of a delve because I don't know what they're talking about delving beyond the form to the substance of the transaction other than coming up with the following total analysis that gives rise to why that transaction is going to be allowed notwithstanding the fact that it is a transfer in

respective equity.

And there's a sentence -- goes forward -- and there's a note above the record demonstrates that Eisenberg was a Ponzi scheme before Mackenzie provided his principle investment thus well before the transfers were made. Because of this Mackenzie acquired a restitution claim at the time he bought into Eisenberg's Ponzi scheme just as the investors in United Energy acquired -- that's the other case they were distinguishing from this Agri-Tech case which was an equity case where there was no inceptive fraud -- just as the investors in United Energy acquired a restitution claim at the time they bought their solar modules. It is this restitution claim in toto that Mackenzie exchanged when AFI returned Mackenzie's principle investment amount. That is the analysis of the Ninth Circuit.

There is no discussion of one single argument advanced here today about any problems attendant with silent transmutation, not a one. No issues of Bankruptcy Code, no analysis of anything, just a conclusion. And so I would submit that it's a formalistic and artificial basic determination that there's a transmuting of a unarticulated claim for fraud converting an equity investment into something else because the court goes and says I'm going to go beyond the form to the substance of the transaction.

I for the life of me don't understand what that means. I mean if you're going to go to the substance of the

transaction go to the substance of the issue confronting the Court and that is how do you get -- this justification should have been before the Court -- how do you get this notion that the restitution claim is what was exchanged when that never happened. That's the substance. The substance is there was no discussion of any of that. It's a late after the fact contrivance.

And then finally Terry which shed some positive light. Terry is cited for a couple principles. First of all, it is a fraud case, but it is not technically in a Ponzi scheme and it involves the return of dividends that are not fair. And what the court says is all of these cases involve a Ponzi type fraud scheme, but none of them involve the recharacterization of dividends as the repayment of an indebtedness. That came out in 2007. What that court was saying is what we're saying here today.

At that time and before AFI to the extent its reasoning is even there, there were no courts that talked about the recharacterization, whether it be dividends or profits, the same thing. No equity like distributions in exchange for the repayment of an indebtedness is what that court holds, and then goes on to say the salient point here is that once the interest held by the recipients is determined to be equity rather than debt any attempt to recharacterize the dividend payment as payment and satisfaction of an antecedent debt fails. And

that's what we have here.

And they go on to say if that were the case in almost every corporate bankruptcy case involving fraud shareholders could advance their status and recharacterize their equity interests as unsecured claims, sharing equally in the assets with the holders of unsecured claims. And that's exactly what 510(b) is all about. So there's the first real case that examines any of the issues along the lines, not all of the issues we examined, but some of the issues that we examined here to justify why this transmutation without articulation cannot work.

And then finally we come to asking for partial summary judgment that the For Value matter can't be satisfied. We confront the argument -- by the way, go back to that other case again, that other little highlight, there was one other little quote. There is no precedent for the proposition that dividends paid to stockholders -- or substitute here, you know, distributions paid to stockholders may be recharacterized as payments in satisfaction fo some kind fo debt. Also from that Terry decision.

So we now confront in the final minutes here and I'll be done the notion that we're told well you can't have it both ways. You're saying on the one hand you are creditors for purposes of saying that you have an insolvent estate, for purposes of Moore v. Bay, for purposes of Whiteford Plastics

principles -- and we'll come to these in a second -- but on the other hand you're saying you're equity. How can you be both. And by the way, didn't you already say that we were creditors.

And so let's deal with the latter point first, didn't we say they were already creditors. I don't think you can read the plan and the disclosure statement -- and I won't belabor it long -- and come away with a conclusion anything else other than as open and notorious as we could we distinguished between those tort claimants who had tort claims who were going to be beneficiaries under the plan from those who were tort claimants and are tort claimants as if and when they pay their money back, but who are not entitled to tort claimant status until their claim is allowed who are going to be sued because they haven't given back the money and haven't otherwise settled.

The plan is explicit about all that and I need only look at section 3 of the plan, 3-10, which says the post-confirmation debtor acting through the plan trustee shall be authorized to pursue and manage and resolve bankruptcy claims against holders of investor tort claims as set forth in Article 5. So that takes you right to Section 5. Section 5(c) says the plan trustee shall object to the claims of the holders of investors who are less than their high water mark.

Now we didn't do it to everyone, Your Honor. There was some -- and I think this was all disclosed in the plan itself -- there were some people who got such a de minimis

amount back that it made no sense to be pursuing them. So there was some flexibility afforded so that we weren't wasting dollars and cents and husbanding more rationally the cash of the estate. -- who got less than their tort claims who are less than their high water mark and can institute adversary proceedings. And then those who are listed are expressly told that they're listed and they're not going to receive -- and this is consistent with 502(c) -- they receive no distribution until their claims are resolved. In other words, they don't have a claim as such. Even if somebody had for example, Your Honor, invested a hundred thousand dollars, gotten 50,000 back, and let's assume that was over the threshold. So as to the 50,000 they're not entitled to receive any distribution until they resolve the fact that they got $50,000 back. And so while they are a claimant for $50,000 potentially that isn't going to get resolved their status as a defendant as to the 50 they already got back is resolved. The plan is explicit abut it. And then there are three or four pages, not a paragraph or two, in the disclosure statement that discussed the whole issue and discussed the fact that there is going to be -- that there was a Ponzi scheme and how all of this worked and it lays out in explicit detail, for example, if the recovering investors can establish good faith they maybe able to establish that they provided value. Under the terms of the debtor's investment agreements the debtor's investors held equity interest in the

debtor's investment funds. And then it says focusing specifically on the For Value prong, recovering investors because they made their investments in the debtor's of equity holders may not be able to satisfy that prong of 548. And we go on and then describe what the problem is and its -- they're seeking it based upon this transmutation principle and that we're going to proceed with it.

Everybody is on notice that this is going to happen. There is no -- it's disingenuous I think to make that argument. That said, if we turn from whether or not it's open and notorious and there's no res judicata effect -- and the distinction is that everybody is a tort claimant as defined under the plan. Some tort claimants have an obligation owing and they can't get any recoveries and that's the distinction.

Now, as to having tort claims the idea of the plan was that everybody who has a tort claim as and when allowed has a claim that relates back in time. Nobody is disputing that they don't have a claim that arose at the time they first made their investment. That's not disputed. Therefore, there isn't an issue of whether or not once now blessed by the bankruptcy plan or if it otherwise required an adversary proceeding I suppose blessed by the adversary proceeding you have a now for then determination that the claim existed and the treatment now for then is what the plan is all about. The fact that these people have claims that relate back give them creditor status

once that claim is established as such. That's what this bankruptcy was about, establishing that as the case. We're just not blessing those who got money back until and unless they put money back in the coffers correctly and then they too will have tort claims. There's no dichotomy that catches us on the shoals. There are creditor claims, lots of them, of people who got not one set back who under the plan now have claims, those claims relate back in time and under Moore v. Bay anybody who got distributions from and after any extant person who is a tort claimant with an allowed claim gives rise to that person being able to assert on behalf of everybody under Moore v. Bay the rights to avoid. That part's unassailable.

The issue that I think is presented by the defendants here is, well, there are no creditors. Our view of the matter is clearly they are. The only problem is, transmuting when they did it. There's no question that they had a claim. That's why they're called investment -- investor tort claimants. We acknowledge that the problem is transmutation and payment back then, not whether they had a claim.

And, so that same principle not only applies to Moore V. Bay, it also says the estate's insolvent because all those creditor claims are treated as such and it also solves Whiteford which stands for the proposition that you can't give -- can't make an avoidance claim for the benefit of equity. Since all these people are essentially creditors, not equity,

that's the case. And there's also a finding in the Bayou decision that stands for the proposition that in the context of circumstances where you don't have an insider benefitting, but have a circumstances where all the parties who are adversely affected, even if you're going to call them equity, are really innocence, that the Whiteford principle which was designed to say you don't avoid for the benefit of insiders, isn't this case here. These are essentially outsiders who were duped and we'll treat it as such and won't make Whiteford apply even if you don't treat them as creditors.

But, for all the reasons we've stated, in our view, these folks were creditors. They relate back in time. The issue is transmutation, not whether they had a claim, but how it was treated. That's the nub of the case. It's the nub of any defense and with that, Your Honor, I'm complete and I appreciate the Court's indulgence and that of my adversaries, as well, and anybody else who I imposed on.

THE COURT: Thank you. Mr. Mungovan, are you next?

MR. MUNGOVAN: I am next, Your Honor. Just so I can pace myself I think that you said you'd go to your luncheon at -- is it quarter of 12?

THE COURT: Yes.

MR. MUNGOVAN: Thank, Your Honor.

THE COURT: I'll probably leave -- I'll probably leave the -- we'll probably need to break by 11:40.

MR. MUNGOVAN: Okay. If I'm not done with my argument, can I continue?

THE COURT: If you're not done, we'll come back and hear it when you're done.

MR. MUNGOVAN: Thanks so much, Your Honor.

THE COURT: When I'm done, excuse me.

MR. MUNGOVAN: On behalf of the Joint Defense Group which is identified in the memorandum that was submitted by the various parties, I want to thank Your Honor for hearing us today.

Let me start by trying to summarize the last hour and twenty minutes or so into the trustee's argument, in a few sentences, okay? I think the trustee's argument is actually fairly straight forward. He's essentially saying that the defrauded investors here, these individuals, did not give value under 548(c), okay? His argument is that their investments that they made when they subscribed into the fund were in the nature of equity, not debt. So, he creates this very bright distinction between equity and debt.

He's arguing -- the trustee is arguing that the Court should decline to follow what has been the consensus view on how to handle these types of transfers to defrauded investors. And what he's essentially saying is that in a Ponzi scheme context you should treat investors as equity and not, as he articulates this transmutation theory, as somehow having been

converted into debt holders.

The rationale for distinguishing this case -- the IMA case, Your Honor, from a long line of cases that we'll go through in more detail is essentially two manufactured rhetorical theories that the trustee has come up with. And one of those is the transmutation without articulation theory, and the other is what he calls the claims squared analysis. And I would suggest to you that when we go through the case law, both of those manufactured, distinguishing features fall apart upon any analysis of the cases.

What we think the right way to go here, Your Honor, is the consensus view of all of the cases that have analyzed this type of Ponzi scheme and these types of transfers to defrauded investors. What those cases tell us, what they teach is, that the equity versus debt distinction that the trustee wants to highlight is irrelevant. The courts don't even look at it. They don't analyze it, at all. What the courts focus on is the claims that arose at the time that the investment was made. Okay? The key in this case and the key in all of those other cases is that this was a Ponzi scheme.

The trustee asserts that as a Ponzi scheme it was a fraud from the beginning. That's in the trustee's undisputed statement of material facts; fraud from the beginning. What that means then is, that when each one of these investors represented by each of these lawyers out here invested, they

lost money at the moment they invested. We haven't heard the trustee's counsel talk about that, at all. He doesn't want to focus on that.

What he wants to focus on is the time that the transfers took place out from the fund to the investors. Again, that's not the focus of what the courts are looking at. The consensus view is, the first place to look is what happened at the time the investment was made and that key fact is going to be the distinguishing feature in several of these cases that we'll get into.

The next key feature is that the trustee admits -- after admitting that there was a fraud ab initio, the trustee admits in his papers that each of these defrauded investors had a claim that arose at the time of their investment. That's the loss. So, whether you call it a claim for recission, whether you call it a claim for fraud, a claim arose at the time the investment was made. And the trustee makes those admissions on Page 8 of his opening brief and Page 6 of his reply brief.

The reason that that admission is important, Your Honor, is because under the definitions of the code a claim for recission constitutes value at the time that the payment -- the transfer was made from the fund out to the investor. There is an exchange -- a dollar-for-dollar exchange is how all of the consensus cases look at it, a dollar-for-dollar exchange between the redemption payment and the recission claim.

If you look at, Your Honor -- I'm going to highlight a couple of cases here which were cited in both parties' briefs. The first case is the United Energy Corp. case which Mr. Kaufman referenced. It's the Ninth Circuit Court of Appeals from 1991. And what the Court says here is on Page 595, value is defined for the purposes of Section 548 of the code as "property", or satisfaction or securing of a present or antecedent debt of the debtor. We went through that already. The term "antecedent debt" is not defined in the code. Debt, however, is defined in the general definition section of the code as "liability on a claim".

And then the Court goes through to define "claim" and it highlights the defined term in the United States Code for Claim. And what the Court then says is, "The legislative history of the Code evidences Congress' desire to provide an expansive definition of claim under Section 101, Subsection (4). Thus, it is plain that Congress intended debt and therefore antecedent debt to be construed broadly."

And then what the Court does is it goes on to explain that there's this dollar-for-dollar exchange between the claim, the recission claim and the transfer of monies out of the Ponzi scheme, meaning that the investor gave value. And that, Your Honor, is a summary of our entire position in this case. Our clients -- the joint defense clients and, indeed, every investor in this case that the trustee has brought an avoidance

action against has given value at the time that they made or accepted the transfer of monies out of IMA to themselves by giving up a dollar-for-dollar claim for recission based on their fraud claim at the time that they invested.

So, let me focus back in on the trustee's position. It's our contention, Your Honor, that the trustee is focusing on the wrong thing. He focuses on the nature of the investment asserting that the nature of the investment when made, being "equity" in his definition, is the controlling feature and is the controlling aspect of this entire analysis. Instead, what the consensus cases say is, the controlling feature is the fraud that existed at the time that the investment was made.

Now, the trustee attacks the consensus -- the consensus of cases in three ways and they're all tied to this notion of an equity investment at the time of making the investment. First, we're going to start with Ebby because that's where the trustee starts. If he continues to assert that the nature of the initial investment in that case wasn't a "equity investment" -- excuse me, a debt investment, a debt investment, the trustee tries to distinguish Ebby by saying the investors in that case made an investment as a debt. It's not equity.

Your Honor, if you look at the case and I'm going to bring it out and read you some of the pieces of the case, it's just not supported by the plain language in the case, itself.

In fact, as you read Ebby it is eerily like the IMA case except that Ebby was written in 1924.

This is a description of the facts, Your Honor, right from the case, Circuit Judge Woods, Circuit Court of Appeals, Fourth Circuit. Young, beginning probably in the early part of 1919 and continuing until bankruptcy in October 1922, Young conducted in Baltimore a blind pool. Today we might call a blind pool a hedge fund. He induced customers to pay to him for this enterprise various sums of money. For each payment he issued a receipt providing that the amount was to be placed to the credit of the customer in an account opened and managed by me for the -- I'm going to quote here -- was to be placed to the credit of the customer, "in an account opened and managed by me for the purpose of buying and selling any securities traded in on the New York Stock Exchange."

So, what were they doing? They were making an investment into a pool to allow the manager, this individual, Young, to buy and sell securities on the New York Stock Exchange. It sounds a lot like our case. The Court goes on to note that the customer was to have the right, "to withdraw all or any part of his account upon 30 days written notice to be given on the first day of a calendar month."

Your Honor, if you look at the subscription documents that are attached to my brother's papers you'll see many of the same features, that it was a blind pool where the manager, Kirk

Wright (phonetic), and his entity was allowed to invest in all manner and any manner of assets. There was a right to withdraw your capital account on 30 days written notice. There was a sharing of the profits. In other words, the manager, Kirk Wright, like the manager in the Ebby case, got a large share of the profits. The manager in the Ebby case, I believe, got 30 percent of the profits, so he was a little bit higher than Mr. Wright.

What my brother showed you up on the board, Your Honor, in an effort to demonstrate that this is a debt case and not an equity case was a quote, and I'll read it to you again. The quote is, "At the time that it was made," referring to the payment, "Young owed Ashley $3,000 for money actually paid to him which Ashley had a right to recover from him from the moment that he was deceived into paying it." I want to highlight that word "deceived", Your Honor. I'm going to read it again. "Ashley had a right to recover form him from the moment that he was deceived into paying it."

Now, when I heard my brother talk about that particular caption, what I heard him trying to say is that that sentence suggests that this is a debt case. But, this sentence, to me, suggests something entirely different. What this sentence suggests to me, and if you read the case that immediately follows it, Clark Trustee v. Rogers, which I did this morning, you'll realize that what the Court is talking

about there is that a claim for recission has arisen for fraud at the time that the investment was made. This is not a note case. This is not a situation where the investor gave -- or received a note in exchange for giving money to the fraudster. This is just like our case.

And what the Court is saying here, for maybe the first time, is that upon the making of the investment where there is a fraud, a claim for recission arises at that moment. And what the case also says is that as a result of that claim for recission arising, when the investor receives back principal there is a dollar-for-dollar exchange on the recission claim, meaning that the investor gave value. So, I would suggest, summing up the Ebby case, that the trustee misreads the Ebby decision.

The second thing that the trustee does -- so, aside from this excessive focus on equity -- the equity investment up front and misreading the Ebby case, the second thing that the trustee does is he's come up with what he calls or constructs the claims squared concept, which in plain English means that there's alternative theories of the decision. That's all the plain -- that's all that I believe claims squared means as I read my brother's brief.

What's a fiction though is this idea of the alternative theory of recovery. This claims squared analysis, "the alternative theory of recovery", is premised upon the idea

that Ebby is a debt case when, in fact, we know now having read it that Ebby's not a debt case. Ebby is -- if it's an equity case, it doesn't matter. It's just like our case. Okay? But, the Court doesn't care equity versus debt. What the Court focused on was the fraud that existed at the time of the investment.

So, the claims squared analysis, the alternative theory analysis, is a pure fiction created by the trustee in order to create controversy around and distinguish the consensus cases from our case when, in fact, an analysis of these cases shows that these cases, the consensus cases, even the cases that the trustee cites, are on all fours with our case.

What the trustee then does is, he applies what he calls his claims squared analysis -- and I'm going to walk through some of these cases, to -- we'll go through the first case, the Independent Clearing House case. And the Independent Clearing House case is from the Unites States District Court for the District of Utah from 1987.

THE COURT: That case gets a little more weight than other cases because there was three judges who decided it. It's an en banc decision. I don't know if you all noticed that. Go ahead.

MR. MUNGOVAN: So, in --

THE COURT: There was more than one judge is the

point that came to that conclusion.

MR. MUNGOVAN: I understand.

THE COURT: Although they were all in the same district, maybe they were infected by one another.

MR. MUNGOVAN: That has a tendency to happen sometimes.

THE COURT: So, go ahead.

MR. MUNGOVAN: The key -- there's several key points in this case, Your Honor. And, of course, you can read it on your own, but I want to highlight a couple of the key points.

First and foremost, what the Court says -- and I'm going to quote right from the case, "The trustee argues on appeal that each contract between a defendant and a debtor did not create a debt on the part of the debtor, but rather gave the defendant an ownership interest in the debtor's business." Sounds a little bit like what the Court is saying here is what the trustee in this case is arguing the same thing -- this is the Independent Clearing House case -- is arguing the same thing that our trustee here is arguing.

These individuals who received these transfers were actually equity investors. Okay? What the Court says though is we conclude that the debtors received, "reasonably equivalent value in exchange for all transfers to a defendant that did not exceed the defendant's principal undertaking, but to the extent a defendant received more than he gave the

debtors, the defendants did not receive a reasonably equivalent value."

Then the Court goes on to explain its analysis or its conclusion. So, what they're saying is, up to the amount that you invested you gave reasonably equivalent value because this is a Ponzi scheme. What the Court says is from the time a defendant entrusted his money to the debtors, he had a claim against the debtors for the return of his money. We believe that the Code's definition of debt and its related terms is broad enough to cover the debtor's obligation to return a defendant's principal undertaking whether that obligation was based on the contract between the debtors and the defendant or was based on the defendant's right to restitution.

So, what the Court's saying here is, not that this is claims squared, what the Court is saying is, look at the time the investment was made. There was a fraud. Okay? And so there's reasonably equivalent value that is given as a result of the fraud based on either the contract or on a recission claim. The Court's not saying here, importantly, this is a debt case and therefore the investor gave reasonably equivalent value. That's not what the Court's saying, at all.

The Court then says, "Thus to the extent the debtors' payments to a defendant merely repaid his principal undertaking, the payment satisfied an antecedent debt of the debtors and the debtors received value in exchange for the

transfers. Moreover, to the extent the transfer merely repaid a defendant's undertaking, the debtor received not only a reasonably equivalent value, but the exact same value dollar-for-dollar. We, therefore, hold that such transfers are not avoidable under Section 548(a)." That's our case, Your Honor.

Next point. The Court says, "The trustee has not argued that the contract between each defendant and the debtors was illegal or otherwise unenforceable on its face. Courts' refusals to enforce an illegal bargain generally rest on the elementary principle that one who has himself participated in a violation of law cannot be permitted to assert in a court of justice any right founded upon or growing out of the illegal transaction." That's not our case either, Your Honor.

Last point on this case. The Court says under Section 548(c), so we were under 548(a), the section that I was just reading to you, now, we're under 548(c). The extent to which a defendant gave value for a particular transfer is essentially the flip side of the question we have already discuss under Section 548(a)(2), namely whether the debtor received a, "reasonably equivalent value in exchange for the transfer." For the reasons previously stated, we conclude that what the defendants gave the debtors in exchange for such transfers was not value -- excuse me -- that's the profit section. I apologize, Your Honor.

Next section. We have also concluded that to the extent transfers to a defendant did not exceed the amount of the defendant's undertaking, the debtor received a reasonably equivalent value for the transfer. The converse is also true. To the extent that a defendant received amounts less than or equal to his undertaking, he gave value to the debtor in exchange for the transfers. This case, Your Honor, is on all fours with our case.

I see that it's time to break. I'd like to continue my argument after lunch.

THE COURT: Yes, which we will do.

MR. MUNGOVAN: Thank you, Your Honor.

THE COURT: Thank you. This would be a good time to break, so why don't we come back -- well, let's just say about an hour, at 12:45, okay?

MR. MUNGOVAN: Thank you, Your Honor.

THE COURT: Thank you all, very much.

(Recess)

COURT CLERK: We're back on the record in the IMA case.

THE COURT: Go ahead.

MR. MUNGOVAN: Good afternoon, Your Honor. Thank you.

Let me just recap where we were, Your Honor. The trustee is attacking the consensus view of how to handle

distributions to defrauded investors in three ways. He attacks the Ebby case, which we've explained that attack is without basis in the case. The trustee has then created these two constructs, and I'm going to use a word that the trustee's counsel used in his argument, and that is a fiction. The word is a fiction. Those two constructs, Your Honor, one being claims squared and the other being transmutation without articulation. They are a fiction. They do not exist in the case law.

I've pointed out what claims squared means I believe in my interpretation of the case law. It essentially is this alternative theory of rendering a decision by the Court. And as I walk you through a couple of more cases I'll emphasize why the claims squared theory actually lacks any basis in fact.

This transmutation without articulation is, it's a figment of imagination. It doesn't exist. Not only does it not exist in express terms in any of the cases, it doesn't even -- there's no basis for the concept in the cases themselves. Let me explain why.

In the M&L Business Machines case which the trustee cites in both of their briefs, and that case does happen to involve an instance where the initial investment appears to be in the nature of a promissory note, a debt, as trustee's counsel would refer to it. And what the Court goes through to decide, in great detail, is that there is a claim for recission

based on a Ponzi scheme that existed at the time of the investment. And what the Court focuses on again is not the nature of the investment that was made by the defrauded investor/defendant. What the Court focuses on is the nature of the fraud that took place and the claim that the investor obtained at the time that the fraud occurred, i.e., when the investment took place. And the Court goes through, in great detail, and explains why the investor has a claim for recission and why the investor gave value when it exchanged that claim for recission upon receiving transfers of principle when it exited the investment.

What the Court says -- and this is -- I'm going to read this. I'm going to quote it because it's a Tenth Circuit case from 1996 and it says, "One who has been fraudulently induced to enter into a contract may rescind the contract and recover the benefits that he has conferred on the party who has defrauded him." In this case the evidence in the record indicates that Mr. McKay, the investor, was fraudulently induced to invest in M&L. As a result in light of the bankruptcy court's factual finding that he did not have actual knowledge of the fraud, Mr. McKay has a colorable claim to recover the amounts that he invested in M&L. The bankruptcy and district courts thus properly concluded that M&L's payments to Mr. McKay reduced the amount of this restitution claim that M&L thereby received reasonably equivalent value for its

payments to him and that the trustee was not entitled to avoid the transfers under 548(a).

What the trustee wants to say, what he says in his reply brief is, "While the M&L Court may have reasoned that the passive retroactive recognition of previously unasserted fraud claims can support the value analysis and the claims squared context, the Court never explored whether unasserted fraud claims can be the basis for the re-characterization of a transfer made in respect to what was originally an equity investment as having been made in respect to the payment of a fraud based debt claim."

Let me try to translate that. What I think the trustee is saying here, Your Honor, is that in the M&L Court -- in the M&L case -- the M&L case really doesn't apply here -- now, I'm acting as the trustee's counsel -- the M&L case doesn't apply here, Your Honor, because the M&L case did not involve an analysis of this recission claim in the context of an equity investment. M&L is a debt case, Your Honor, based on the plain language of the first paragraph where the initial investment was a note.

Your Honor, with all due respect, that's nonsense. When you read the case itself what the Court is focused on in M&L is not the nature of the investment. The Court is focused on the fraud and the claim that arises as a result of the fraud. So, let's put the M&L case aside because we do, in

fact, have a case where a court does, in fact, address the recission claim in the context of what the trustee's counsel would call an equity investment and that case, Your Honor, is the AFI case.

And the AFI case -- if you just bear with me a minute as I turn to it -- the AFI case trustee's counsel referenced in his PowerPoint, Your Honor. It's a Ninth Circuit case from 2008, and in that case we did have a limited partnership. We had a limited partnership. So, under trustee counsel's interpretation of the analysis, the proper analysis, the transmutation without articulation analysis, we have a limited partnership which means that this case, the AFI case, is, according to the analysis of trustee's counsel, just like our case because we have limited partnerships here, too.

But, there's something very interesting that happens in this case, Your Honor. The Court says, "The limited partners in the case at bar were defrauded into their limited partnership role by the operator of the Ponzi scheme creating rights different than the rights held by the limited partners in Agri-Tech. The trustee's argument that Agri-Tech should control because both cases involved limited partnerships -- limited partners," excuse me, "overly simplifies the cases and is not persuasive."

So, what does the Court go on to do? The Court goes on to say, as noted above, the record demonstrates that

Eisenberg's operation was a Ponzi scheme before Mackenzie provided his principal investment and thus, well before the transfers were made from AFI to Mackenzie. Because of this, Mackenzie acquired a restitution claim at the time he bought into Eisenberg's Ponzi scheme, just as the investors in United Energy, which we previously addressed, acquired a restitution claim at the time they bought their solar modules.

There's more that the Court says here, but the point, Your Honor, is that we have here the construct that trustee's counsel claims doesn't exist. We have a situation where the Ninth Circuit Court of Appeals takes a Ponzi scheme which is a limited partnership, which counsel would call an equity investment, and doesn't even address this issue of equity investment versus debt. What they look at is the nature of the fraud and the time that the claim as a result of the fraud arose. And the time that the claim as a result of the fraud arose was at the time the investment was made, as in this case, because remember the trustee has asserted that the fraud started at the beginning before any one of these investors or clients of these counsel here invested in IMA.

Counsel then refers to the Bayou case, Your Honor. Of course, the Bayou case doesn't have -- the holding of that case doesn't have any direct application to this case, Your Honor, because the Bayou case involved prejudgment interest and it involved a claim for profits. What we do know from the

Bayou case that does have application to this case is the Court's reference to this value issue.

Keeping in mind that this decision that trustee's counsel has attached is a decision on a motion to dismiss. As background what the Court says is, "It is also clear under the case law, as defendants assert, that persons who are induced by fraud to invest in the Bayou hedge funds or predecessor funds may have a state law claim for recission and that this tort claim in an antecedent debt which constitutes value for purposes of Section 548(a)(1)(b) and Section 548(c).

"Plaintiffs," -- which is the trustee in this case, "acknowledge that defendant's tort claims for recission of the entire amount of their principle invested constitute value for purposes of Section 548(a)(1)(b). Consequently, plaintiff's constructive fraud claims under Section 548(a)(1)(b) are limited to any fictitious profits which were paid to any of the defendants."

So, the only application that Bayou has to our case because we've already limited -- we've agreed to limit the discussion here today to value under 548(c). What Bayou stands for on that narrow issue is that investors have a claim for recission that constitutes value that arises at the time that they made their investment into the fraudulent Ponzi scheme, exactly as here.

The next point that I'd like to raise, Your Honor, is

this -- the second half of the transmutation without articulation argument -- the without articulation argument. And what the trustee -- I can summarize it in the trustee's reply brief. The trustee says, "The cases cited by respondents actually make the trustee's point that a fraudulently induced party seeking redress has the right to take affirmative action to remedy his injury by either affirming or rescinding the contract and suing for damages." And then the trustee cites to a Georgia appellate court case.

The trustee then says, "The defrauded investors herein never took any such affirmative action to assert or articulate any fraud claims." Well, that would be kind of tough, wouldn't it? Because even the trustee knows that if they were aware of the fraud at the time that they made their redemption, then they wouldn't be able to establish good faith. And we know, Your Honor, that at least in some of the instances where we have investors, for example, Mr. Laird who redeemed only a fraction of his overall investment, we know that he must not have known of the fraud, Your Honor, because logically if he was aware of the fraud why would he have left behind more than a million dollars? He wouldn't have. He would have taken it all out.

And so this idea that the trustee is suggesting that there was some duty among these investors who had no knowledge of the fraud to articulate a claim for fraud at the time that

they were making a withdrawal, again, without trying to sound pejorative, it -- it's nonsense. It defies logic. It couldn't happen. And so this -- again, this idea of a transmutation without articulation fails upon any reasonable examination of what it's premised upon.

The next argument. The trustee cites to the Terry case, and it was one of the last cases that the trustee referenced. We address the Terry case in our brief. We're going to stand on it as stated in our brief, but I want to highlight probably the critical distinction between the Terry case and this case.

The Terry case was not a Ponzi scheme. It was an action to recover payments in the form of dividends to shareholders. There was no corresponding claim of fraud that arose at the time that the recipients of the dividends made their initial investment into the fund. So, Terry has no application to this line of consensus cases on how to handle a Ponzi scheme. It's not a Ponzi scheme case.

Let me summarize in a few minutes here, Your Honor, what's really happening. The trustee is essentially trying to change the law and the trustee can make arguments to change the law. That's certainly permitted under our rules of ethical conduct. It's, in fact, how the laws developed, but he's doing it in a way that suggests that these individual defrauded investors are the ones who are trying to change the law. We

should just face up to the fact -- the trustee should face up to the fact that he's looking to change the law. And what I'm suggesting to the Court is the basis on which the trustee is seeking to change the law has no foundation in the jurisprudence and is fundamentally illogical based on all of the cases that have looked at this.

And what the trustee's counsel wants to say is, these cases, these consensus decision, as we call them, don't really apply because these courts, they didn't look at the transmutation without articulation theory. They just didn't address it. But, the reason that they didn't address it, Your Honor, is because it doesn't exist and this Court should not bring it into existence and here's why.

There's not a single -- there's not a single case that is published that addresses and treats claimants the way that the trustee seeks to treat them. There's not a single case that I'm aware of in the country, Your Honor, involving a Ponzi scheme of a hedge fund where the trustee has successfully been able to reclaim principal from investors, from defrauded investors, where those investors acted in good faith. And we're not getting into good faith. And I know in Bayou that the trustee did clawback principal from investors, but those investors and that case did not have good faith.

I've spoken with the trustee, Jeff Marwill (phonetic), in the Bayou case. And this isn't evidence, but I

can tell Your Honor that if you look through the record in Bayou there are many investors that the Bayou trustee did not go after where they redeemed less than 100 percent of their investment. And that's because that's evidence that they acted in good faith.

If this Court adopts the proposal to change the law that the trustee is suggesting it should, it will wreak havoc in every Ponzi scheme case that happens hereafter where a trustee will seek to clawback principal from innocent defrauded investors. And we will have a series of cases, like this one, where the recovery that has been obtained so far is less than, or equal to or barely above the amount of the legal fees.

Now, I don't know where we are on the legal fees in this case, Your Honor, relative to the recovery, but the last time I checked we were pretty close to par. And if we have a situation where in every case a trustee goes after redeeming investors who were themselves defrauded and who still have a claim for money, like the Lairds and like many of the other investors, we will have litigation that goes on forever. We will have a litigation mill, a bankruptcy mill.

That's why, Your Honor, in Madoff, I suggest to you if you look at the record in Madoff, the trustee in that case has chosen not to go after investors for their principal, unless they were in some way connected to the Madoff fraud or the family. It's why I would suggest to you, Your Honor, that

the SEC in the Stanford case, which is a matter of public record in that case, objected to the trustee seeking to bring actions, avoidance actions against investors who redeemed principal.

This Court should reject the trustee's theory on how to change the law and it should deny the motion for summary judgment. Thank you, Your Honor.

THE COURT: Thank you. Who wants to go next?

MR. MUNGOVAN: I believe that Ms. Passyn, Your Honor.

THE COURT: Okay.

MS. PASSYN: Good afternoon, Your Honor.

THE COURT: Go ahead.

MS. PASSYN: I'm here on behalf of the Joint Defense Group, as well. And Mr. Mungovan hit a lot of the more substantive merits of the motion -- the trustee's motion. I'll be addressing two points that are a little bit more procedural.

First, I'll be addressing the trustee's claims that he has -- that he has established a prima facie case under Section 548 and 544(b) and, second, I will be arguing that at this stage of the proceedings the trustee should be barred from asserting the position he's asserting right now because it conflicts with statements that he's made in the confirmed plan.

THE COURT: Okay. Go ahead.

MS. PASSYN: Pointing at the prima facie case which is something that Mr. Kaufman kind of breezed over there at the

end perhaps because he was running out of time, is a threshold matter, I'd like to point out that the trustee has not, as he asserted in his reply, established anything, any of the elements under Section 548 or Section 544(b) of the code. He's --

THE COURT: As I understand it, we're not here on that.

MS. PASSYN: Yes, I know. I just wanted to point out that he was --

THE COURT: The trustee --

MS. PASSYN: He's asserted --

THE COURT: This issue -- this motion assumes he has a prima facie case.

MS. PASSYN: Yes.

THE COURT: But, and that is so we can reach the value issue.

MS. PASSYN: Yes.

THE COURT: Okay? And I'm going to make that assumption.

MS. PASSYN: Okay. Okay.

THE COURT: But, it doesn't matter because it's not -- that is an assumption for purposes of this motion only. So, I had never understood the trustee to be asking for a determination that any part of the prima facie case has been met; any part. That is not the purpose of this motion.

MS. PASSYN: Yes, Your Honor. The point I'm trying to make is that if the trustee is allowed to take the position he's taking now, that he will not -- it should be at odds with his ability to establish a prima facie case, under Section 548 --

THE COURT: Because why?

MS. PASSYN: -- and Section 544(b).

THE COURT: Okay. Now, I understand what you're saying.

MS. PASSYN: Because under Section 5 -- under an actual fraud theory, he needs to prove that there's a present or future creditor. Under a constructive fraud theory he needs to prove insolvency, and under 544(b) he needs to prove the existence of a creditor.

Now, if the defrauded investors are considered equity holders and not creditors, none of the trustee's claims should be able to go forward because he would not be able to prove a prima facie case under either of those subsections.

THE COURT: Okay.

MS. PASSYN: So, to get around this what the trustee has to do is essentially speak out of both sides of his mouth. On the one hand for essentially every purpose that suits the trustee, the defrauded investors are creditors. For purposes of under an actual fraud theory, they're creditors. For purposes of establishing insolvency, they're creditors. For

purposes of proving that there's an actual creditor under 544(b), they're creditors.

But, when the defrauded investors tried to invoke that same creditor status for purposes of 548(c), suddenly -- and to use Mr. Kaufman's words -- presto chango, they're equity holders. These are obviously two legally inconsistence positions, and he understands that. So, to explain himself he's developed this articulation theory that the defrauded investors were -- because they were only exchanging equity interest at the time and they failed to articulate their claims, then it does not constitute value.

But, in another 180 degree turn the trustee, himself, there's no articulation requirement for him. He's allowed to use these unarticulated, unasserted fraud claims for his benefit whereas the defrauded investors are not allowed to do it. And, for example, to avoid a constructively fraudulent transfer the Court has to look at the solvency of the debtor at the time of the transfer. But, if the defrauded investors' claims, according the trustee, were never articulated, so if the -- according to him they were never articulated, so if the trustee were actually bound by his own theory, those same claims would not constitute debts for purposes of establishing the debtors' insolvency.

So, to get around this he suddenly says that they relate back. They relate back to the time of the transfers,

and he even uses the term "relate back" freely in his reply brief. Well, either the defrauded investors' tort claims relate back to the time of the transfers or they do not. Either the claims need to be articulated or they do not. Either the trustee's positions are inherently -- are -- either the defrauded investors are creditors or they're not.

The trustee's position here is inherently inconsistent. He should not be allowed to use the defrauded investors' tort claim and status as a sword and a shield. And, Your Honor, the same principle applies -- it's our position that the same principle applies to the plan. The trustee's bound by the terms of the plan and the disclosure statement and he should not be allowed to bring a position now that is inconsistent with those terms. But, Your Honor, the plan uses the term "investor tort claims" no less than 18 times and the disclosure statement uses it approximately 40 times.

And the plan defines the term "creditor" the same way it's defined in the bankruptcy code, as any entity with a claim. It defines "claim" the same way it's defined in the bankruptcy code; "almost any right to payment." But, nowhere in the definition of claim or plan -- in the plan or the disclosure statement are the words "articulated" or "asserted". In fact, absent from the plan and the disclosure statement is any mention of the trustee's position that because the defrauded investors failed to articulate their claims at the

time of the transfers they did not give value under 548(c).

He did put up on the screen Section 310 of the plan which said that he would assert bankruptcy claims. No one's denying that he is allowed to assert bankruptcy claims. He put that in the plan. And -- but, what he put up in the disclosure statement is one paragraph buried in the middle of the 50 pages in the disclosure statement and it says at the very end that he may seek the return of principal, based on his theory that the defrauded investors only exchanged equity interest at the time.

THE COURT: Didn't the plan provide for settlement of claims for a return of principal?

MS. PASSYN: It --

THE COURT: Have I missed that?

MS. PASSYN: It did provide for settlement of claims.

THE COURT: Only that was part of -- there was a proposal that creditors could accept a settlement dealing with returns of principal, right?

MS. PASSYN: Yes.

THE COURT: Okay. Go ahead.

MS. PASSYN: Oh, my -- the point I'm making --

THE COURT: So -- and, so the plan -- I'm sorry. I told you to go ahead and then I interrupted you.

MS. PASSYN: Oh, sorry.

THE COURT: That's not very polite on my part. But, so there's never been any question about the fact that these

law suits to recover principal were going to be brought, was there?

MS. PASSYN: Well, under an actual fraud theory if we didn't act in good faith he could recover principal. I mean, the point I'm trying to make is that under -- he does not clearly assert that he was actually going to say that we -- our equity interest because our tort claims were not articulated at the time, he does not say that those do not constitute --

THE COURT: So, there's --

MS. PASSYN: -- value and that he was, in fact, going to do this.

THE COURT: So, your argument is that because the trustee didn't tell you what his exact legal theory was, although you knew you were going to get sued you didn't know exactly what the reasons were, is that the problem?

MS. PASSYN: My argument is a little bit more along the lines of all throughout the plan, all throughout the disclosure statement, he refers to us as creditors.

THE COURT: Okay. I understand that.

MS. PASSYN: His entire -- for every purpose that suits him, he refers to us as creditors. He should have referred to us as investor equity claims, investor equity holders. He could've done that, and he didn't. He referred to us as creditors.

And so it's our position that he should be barred by

res judicata, judicial and equitable estoppel because at this point in time in the proceedings it would be inequitable for him to do this.

THE COURT: Okay. Anyone else wish to be heard on those two issues? I want to --

UNIDENTIFIED ATTORNEY: Your Honor, I'd like to be heard at some point. I don't know if it's appropriate now.

THE COURT: Well, now would be a good time because I'm about to disagree with her on this -- on the second issue while we're here.

COURT CLERK: See if that microphone will move into that table, so he doesn't have to --

UNIDENTIFIED ATTORNEY: Sure, just slide out of the way.

THE COURT: And the reason I say that is, so Mr. Phillips -- I'll give anyone else an opportunity.

COURT CLERK: I think you can pick it up and pull it and it will come, if you want to just go to the table. Are you okay? Okay.

UNIDENTIFIED ATTORNEY: It pulls down. Is that -- is this fine, Your Honor?

UNIDENTIFIED SPEAKER: Yeah, that's --

THE COURT: Yes, that works.

UNIDENTIFIED ATTORNEY: Okay.

THE COURT: The point simply is, as I've expressed

throughout this case, basically, I had sever questions about why we even had a plan and Mr. Perkins, Mr. Kaufman, Mr. Bernardino, this is one of the reasons why I think plans in cases like this may not make much sense because you end up litigating what is essentially a bankruptcy issue and that's the way I see this. I see this as a trustee for this estate, or these estates consolidated, seeking recovery against these defendant; period. It's a matter of bankruptcy law.

To me, what the plan says makes no difference. The definitions in the plan don't control this case one way or the other, and that's why I was asking about -- there's a potential, I suppose, for the binding effect of a plan that doesn't clearly state that claims or causes of action are going to be pursued. I don't think that the terms of the plan in that regard are unclear about the fact that these types of claims are going to be pursued. And this would be a good time for anybody who has a contrary view to let me know.

The fact that this complaint or this motion articulates a different theory of recovery of these amounts does not, in my judgment, amount to equitable estoppel, judicial estoppel, or issue preclusion or claim preclusion. I do not see that it's preclusive in any way.

So, I'm happy for anybody else to convince -- now would be a good time for people to convince me that I have missed something in that analysis. Mr. Phillips, maybe you can

start.

MR. PHILLIPS: Your Honor, that's really not my issue or why I'm here to talk today --

THE COURT: Okay.

MR. PHILLIPS: -- so, if you want to hear somebody else on that then --

THE COURT: I'll hear anybody else want to hear about --

MR. PHILLIPS: -- I'll have to defer.

MS. PASSYN: No, but I can remind you to make that first point, too.

THE COURT: Well, I hadn't gotten to that. I hadn't gotten to that one yet. Yes, ma'am, in the back. Sure.

MS. PEOPLES: I think the problem of going along with the presentation a moment ago -- and my name is Valerie Peoples.

THE COURT: Thank you.

MS. PEOPLES: I am a pro se defendant, former lawyer -- is that to make matters worse, at least in terms of my understanding of my reading and hearing about the plan, was the conversation I had with counsel.

When I initially, back in 2007, called their office because I had heard about the matter through my relatives who are also involved in this litigation to say I hasn't got any paperwork, my question to them was, is there anything that has

that I've missed? Are there any particular documentation that I needed to look at? Had they at the time engaged me in the conversation and said, you know this action has been going on for 2006. I said to him, where is it? And at that time the conversation was such, we'll put you on your mailing list and if anything occurs we'll let you now.

That -- at that particular time, at least, I would have been in a better position to be responsive to a plan or be responsive to whatever issues arose instead of going almost from that point in time last summer until January receiving a formal complaint then engaging in the behavior of trying to get records which have been destroyed, which have made the possibility of settlement impossible to be involved in this process.

It's just really -- I'll say this, I really felt as though I was further being conned. It was bad enough that I had my experience with Kirk Wright believing that after I had gotten out of the case that several years had gone by. I knew the records weren't correct, for them to also be convinced that the records they had were correct and not to be able to get bank records is a horrible position for an investor to be in. And the level of time and energy and resources that this takes and the fact that it has physically made my sick, I've spent more money at the Natural Path from the stress of this than I care to think about.

So, to allow them to create that impression is unfair. And then for him to get up and stand here and then give the Court the impression that we've tried to work with the investors, to the best of our ability, is not true. I have spent more time trying to say okay, do you want this evidence, do you want that evidence, and jumping through jumping jacks. It is not fair and it is the thing that, quite frankly, from where I sit in the jurisdiction of New Jersey that I have been in borders on a level of lack of ethics in terms of the level of which this has gone on. Thank you.

MR. KAUFMAN: I take exception to every single thing she said.

THE COURT: Okay. Thank you. Thank you. I'm not going to get into that because that's not what we're here about today, so I hear what you're saying. I'm sorry you had these problems -- that you think you had these problems, I should say. I don't know whether -- the merits of them. I'm not going to get into that, so the trustee, committee counsel don't need to worry about responding to that because that's not before me today. That issue is not really relevant to this issue, in any event. This is a strict legal issue, the way I see it, based on the undisputed facts. Go ahead, Mr. Phillips.

MR. PHILLIPS: Okay. Good afternoon, Your Honor.

THE COURT: Well, wait a minute. Anybody else have anything to say about the judicial estoppel or the preclusive

arguments?

(No audible response)

THE COURT: Okay. I reject those arguments and that's the ruling for those reasons on that issue. Okay. Go ahead.

MR. PHILLIPS: Okay. Good afternoon, Your Honor. This is Chris Phillips on behalf of the defendants David Wisneski and Michelle Peoples Wisneski.

I just want to highlight a couple issues that are -- if not -- that only my clients hold, that only a couple of defendant hold. I just want to bring them to your attention.

I know the trustee has said several times that, you know, the ruling on this motion has no effect on a defendant's ability to raise particular issues. I am somewhat concerned that any adverse ruling would have some sort of preclusive effect on my clients, thus I want to raise these issues. You can keep them in the back of your mind, but these, to my mind, are very significant.

The first and most important issue is that it seems pretty clear that the trustee's case, if not entirely, largely relies on the existence of these limited partnership agreements, or I guess they're also called limited liability company agreements. I did some very limited discovery during the course of this for-value motion trying to request those documents from the trustee. The response was, those documents

don't exist. I think the trustee's -- or I -- actually I know the trustee has now supplemented his affidavit saying, these agreements don't exist as to these particular defendants, and my clients are two of those defendants.

You know, one thing I do take issue with though is that I think is his reply brief the trustee said that we had presented no evidence to show otherwise that we were not equity members, and I take issue with that first three --

THE COURT: Well, hold on. Let me -- because I've read your brief and I understand your position and I'm not ruling on that issue today.

MR. PHILLIPS: Okay.

THE COURT: That issue is not here today. I understand the concern of lawyers wanting to make sure, but I read Mr. Kaufman's reply or whatever the reply was as saying that's not on the table.

What we're talking about today is if -- if you're -- I'm not even going determine that people who signed a limited partnership agreement or limited liability company agreement are equity investors. That's not the issue, I don't -- as I understand it. It seems to me if you've signed something that says I'm going to be a member in a limited liability company and I'm going to make a capital contribution and I'm going to get profits, that sort of indicates it's an equity investment.

But, that's not the purpose. The purpose is assuming

one has invested on an equity basis so that one's investment is characterized as an equity investment, does that person have the ability to assert a value based defense? That's the issue as I understand it. So, there's -- your clients are in no way prejudiced by this motion --

MR. PHILLIPS: And I appreciate that, Your Honor.

THE COURT: -- on that -- on whether they an equity interest. I don't remember whether it was your defense or somebody else raised the question of interest. Is that what you're about to get to, or did somebody else raise that issue?

MR. PHILLIPS: Well, I'm not sure that I follow you. One of the things, we did have an attachment to our brief that clearly showed that the understanding between the parties that were -- was that we were clients or customers and that we had accounts. You know, that's --

THE COURT: That's not the issue before me today.

MR. PHILLIPS: Right.

THE COURT: So, we don't have to worry about that. Somebody raised the issue that as part of the recission claim they were entitled to interest which would --

MR. PHILLIPS: No, that wasn't my clients, Your Honor.

THE COURT: -- permit them to raise the value defense with regard to any amounts received in excess of the principal, and I don't know whose that was.

MR. BARLOW: That was us, Your Honor.

THE COURT: Was that you?

MR. BARLOW: That was Nixon Peabody on behalf of --.

THE COURT: That's not here today either.

MR. BARLOW: I understand, Your Honor.

THE COURT: Okay. So, you won't have to get up and tell that. Okay. So, what was your other --

MR. PHILLIPS: The only other other small matter I'd like to point to is another premise, I think, of the trustee is that these equity interests were, in fact, worthless, nearly valueless to the time of the transfers. And I think that relies on one large premise, and that's the existence of the Ponzi scheme. And then we all know Ponzi schemes. The case law says Ponzi schemes are insolvent from the inception.

Well, Your Honor, you know, there's been -- and I know this goes to his prima facie case, but there's been no showing there's a Ponzi scheme and more importantly for my clients is that my clients' transactions occurred back in 1999 and I'd submit, Your Honor, there's more than the possibility to there was no Ponzi scheme in existence at that time.

And, you know, that brings me to another point is the fact that these actions, many of them, definitely against my clients were filed, well we think, outside of the statute of limitations. I know you have that brief before you on that issue. That's something separate and apart. But, you know, I

think that's another issue the Court needs to be aware about that, you know, while the trustee can make the argument that these equity interests were worthless, there's been no showing that they were worthless. And so I --

THE COURT: All right. I'm assuming there was a Ponzi scheme.

MR. PHILLIPS: You're assuming there's a Ponzi scheme?

THE COURT: I'm not deciding that issue.

MR. PHILLIPS: Yes, Your Honor.

THE COURT: Because if there's no Ponzi scheme, the trustee's case goes away, as I understand it. Am I right, Mr. Kaufman?

MR. KAUFMAN: Your Honor --

THE COURT: Your actual fraud case goes away.

MR. KAUFMAN: The actual fraud case goes away. The constructive fraudulent conveyance doesn't. And, frankly, I haven't given much consideration to it because the prospect that in the light of what we know, Mr. Wright's criminal trial, the history of all of this, that if this isn't a Ponzi case, I don't know what world I'm living in. But, that's not for today.

THE COURT: So, I'm assuming the existence of a Ponzi scheme.

MR. PHILLIPS: Yes, Your Honor. Okay. I just wanted

to bring --

THE COURT: And I'm not today deciding the statute of limitations issues. And I'm not decided there was a Ponzi scheme.

MR. PHILLIPS: I realize that, Your Honor. I just want to bring those matters to your --

THE COURT: No, I --

MR. PHILLIPS: We're here in court and lawyers like to talk in court, and that's what I'm here for.

THE COURT: Well, I understand. Judges like to talk in court, too. It's been very difficult for me.

MR. PHILLIPS: All right. Thank you for your time, Your Honor.

THE COURT: Thank you. Okay. Any other issues need to be presented before we go back to Mr. Kaufman? Okay. Go ahead.

MR. KAUFMAN: Thank Your Honor. I'll be as brief as I can. I'm going to try to track along with the comments first by Mr. Mungovan and then address the issues of the talking both sides of the mouth about the creditor on one occasion and then equity on another.

Let me start first with the notion of that this was debt from the inception and the notion that in Ebby the contention is that it was not, and that the cases that we cite as claim-to were not claim-to. Let me say at the outset that

for purposes of fraudulent conveyance analysis, we're obviously looking at the redemption event as the fraudulent conveyance. That's separate and distinct from -- and we acknowledge it's distinct from whether or not there was inceptive fraud or not.

The issue for the Court from the standpoint of claims-to analysis, though it's not binding. In other words, even if there were to be a case or two, other than AFI, that had even reached the conclusion in an equity case, none of the cases whatsoever deal with any of the arguments we've advanced as to why transmutation without articulation work or deal with any of the issues we've raised in the bankruptcy code that it runs afoul of or a State law that it runs afoul of, none of which are discussed essentially by any of the parties who brief this in opposition.

But, to get first to the claims squared analysis, to the extent they're saying this is a body of law that is out there, they're taking the position first that Ebby is a case that is an equity case. It is not. Let me go back to Ebby, itself. One second, Your Honor. Lost it my pile.

Quoting again from the very section we talked about before, "At the time it was made, Young owed Ashley 3,000 for money actually paid to him. In other words it was a debt." Then it says, "which actually has a right to recover because of the moment he was deceived into paying it." Both things are true, but both things are creditor based notions.

And so to the extent that one wants to say, well, I'm going to in every case look at the status to begin with and give them a creditor claim for restitution, that would emasculate everything that we're saying. Of course, that's the case of what they're arguing.

When Mr. Mungovan makes the argument that none of these cases, at all, address the equity debt distinction, that is precisely the point we're making and the fact is that none of them make that distinction because none of them are focused at all about dealing with an equity or debt because they all deal with creditor claims.

Now, let me go specifically --

THE COURT: Well, if there was a debt in Ebby --

MR. KAUFMAN: Then it's a --

THE COURT: -- why would they get into the -- why would they have to get into the restitution issue?

MR. KAUFMAN: Well, how much do they get into it? I mean, it's --

THE COURT: Well, but why would they get -- why would they even mention it?

MR. KAUFMAN: Your Honor, in a way it's surplusage. I mean, first of all, the entirety of -- if we were trying to source anything in Ebby, I mean, we're looking at three lines. We can, you know, blow them up as large as we want, but all it is -- it basically is a statement is that there was a

deception. No one is confused, at all --

THE COURT: Is Ebby a --

MR. KAUFMAN: Ebby is the Fourth Circuit case from 1920 that essentially says virtually nothing about it, other than acknowledging that there was a fraud claim from the get-go.

The fact of the matter is, what that Court does is reach the conclusion that they're going to get back the profits. This statement about the right to recover the principal because of fraud is surplusage, as it happens in all of these cases. Why they get into it, I don't know. But, the fact of the matter is that any of these cases that get into talking about a claim for fraud and then go through an analysis all devoid of transmutation as an argument get into it for reasons that have no real necessity because there is no question, Your Honor -- and I want to deal with this right now in terms of Stanford and Madoff and, in fact, Bayou. Let me handles those right --

THE COURT: You can do that, but what's going on in those cases has absolute no--

MR. KAUFMAN: Well, I --

THE COURT: -- absolutely no relevance to me. I could -- I care because I'm worried about what happens in other courts and what happens to other people, but that has no relevance to my decision.

MR. KAUFMAN: But, I understand, but I --

THE COURT: I'm not going to go find out what's going on in those cases.

MR. KAUFMAN: Okay. All I want to say about them is that they are debt cases. That's the reason. And Bayou, by the way -- I mean, Mr. Mungovan raised the Bayou case and said he talked -- we talked, as well. Let me just mention that decision. The Bayou decision is a decision that they say, well the -- they're actually dealing with profits and they're saying the trustee is not contending that the transfer of -- retransfer or payment of principal constitutes something avoidable. That was the prerogative of that trustee. That is not the position here. We talked to them, as well. They were looking primarily at a substantial body of good faith questions because there was a whole run on the Bayou estate.

And, so the vast majority of the claims that they brought were brought where parties had actually gotten some information and got -- made a run on Bayou and that's what happened. All of those were bad faith and, so they litigated a whole bunch of those and a couple people say it was serendipity. I just happen to make my claim the day this was happening, but I had no inside knowledge and the Court determined that.

That case was primarily a good faith/bad faith case. Our case -- we're not -- and Mr. Bernardino asked me to say

this again, we're not stipulating that all these people operated in good faith. We don't have the proof at this point, but it's to say that our fundamental focus right now is for-value. If some of these people can't prove good faith which is their burden then they won't have good faith. But, what we're primarily focusing on -- and it's only for today's purposes, is focusing on for-value. And in the for-value cases the question is, is there an antecedent debt or not?

And we're saying the contrivance that they had a claim is not an antecedent debt unless it gets articulated. You can't make the argument to say that I have a claim that hasn't been articulated when it arose from debt and when it arose from equity. And the distinction is critical, absolutely critical to the analysis because if I'm simply taking a position where I have a debt -- let's look at M&L, the case -- the promissory note case from the Tenth Circuit that was cited. M&L is a case where it was a note. The Court then went on to say, gee, you've got a restitution claim, as well. Well, if it's a note, you never need to get to the restitution claim. It is total excess. It doesn't matter because if we were in that situation, if these people hadn't signed equity agreements and they have no other defense about it other than, you know, as Your Honor intimated today, not the day they decide that that's definitively the answer, but if they hadn't been signing those kind of agreements but had made debt infusions, as was in

Madoff and Stanford and some of the other cases, we would not be here today. We would not be here today. It is the distinction between making an investment in equity and making an investment in debt that is everything, because if it is debt from the get-go, M&L is that case, and I'm going to show you that in the case -- the Bath decision from Utah against Judge Maybee (phonetic) and others, that it's the same, all of those cases stand for the proposition that it was debt from the get-go.

Let me, by the way, while we're right on it, talk about Independent Clearing House. Mr. Mungovan goes to the argument that this is a case that was a decision premised on looking at the original transaction and saying, gee, there's all the evidence that these people were defrauded. That may be the case of an observation that there is such a notion, but there is no question that this was debt. Quote, from Page 7, 77 B.R. 843 and it's Page 7 in the slip, "The undertakers signed contracts by which they committed to one of the clearing houses a specified sum of cash, credit or other commodities for a period of nine months. The funds committed to the clearing house were to remain under the clearing house's custody and control until the end of nine months at which time the principle amount was to be repaid."

There's no question. That's a claim. It's a debt. And then, to quote the section that later Mr. Mungovan himself

quoted, it underscores the fact that this is claim squared. On Page 16 from the slip opinion, "From the time a defendant entrusted his money to the debtors, he had a claim against the debtors for the return of his money."

We believe that the code definition of "debt" and its related terms is broad enough to cover the debtor's obligations to return a defendant's principal undertaking, whether that obligation was based on the contract between the debtors, claim, number one, and the defendant -- I forgot the -- between the debtors and the defendant, or was based on the defendant's right to restitution.

THE COURT: So, but that raises the same question. If there's not a question of equity in the case, why is the Court talking about the claim for restitution?

MR. KAUFMAN: That is an interesting and insightful question that I questioned when I looked at it, because all of these things look like they're surplusage. And because there is no need -- if you look at it, and I looked at it from the same perspective in a way -- and I'm not trying to suggest you're buying this, Your Honor. I don't know how you're thinking. But, when I looked at it, I said, wait a second. If this is a claim to begin with and now it's going to be this other kind of claim, would I, if I got that far as a jurist, say, well, wait a second, there's a problem of this whole thing being an equity interest from the get-go and getting into all

the case laws about how you treat equity and the distinctions between equity and any notions of under 5-10(b) about transmuting somebody from one thing to another, you would never get there because why would you need to. You're not trampling on anything. You're not changing the character of what somebody is. A claim, is a claim is a claim. They're entitled, absent some unique circumstances of subordination, to ratable treatment among themselves.

So, if I've got a claim five different ways from Sunday, so be it. I mean, all you can do is get your claim back. You're owed an obligation. And so claim squared is in none of these cases that he suggests, including -- the only one where it arises in equity is the AFI case which I've explained reaches the conclusion -- and you can go back and look at the history. It's basically distinguishable in two cases. It simply has one sentence that simply says, because they had this restitution claim, ipso facto, they win and then there's no analysis of any of the points that I'm suggesting. That is the singular case out there that we could find.

In the Terry case, quite to the contrary, when he says it's not about restitution -- let me read from the Terry decision. "Even if the Court assumes that the defendants were defrauded, the Court is of the view that the restitution defense advanced in their briefs is invalid as a matter of law. There is no precedent for the proposition that dividends paid

to a stockholder may be recharacterized in satisfaction of some kind of debt." And he's saying "some kind of debt" in the context of a restitution claim that arose out of an issue.

Now, granted, this was not technically a Ponzi scheme. It was a fraud case, but it was, nevertheless, a restitution based analysis that was being rejected because the Court says you can't simply recharacterize it. And so everything turns on the recharacterization. So, even if there were some other case out there, which I can't find, that goes through this labyrinthal (sic) analysis of the restitution that actually arose in an equity case, so be it. So, there's another case that's out there. The point is none of them -- this is the first forum that I'm aware of and so I don't think I'm changing the law, slight of hand, or anything else, or doing anything nonsensical -- no pejoratives intended -- I am simply making the argument that this is essentially a slate which has not been written on and where no Court has really examined the notion of the contrivance, what I call the presto chango, the slight of hand, the prestidigitation, whatever you want to call it, legerdemain, of changing the notion of something that started out as equity and turn it into debt without all the panoply of procedurals that should attend any of that and without giving cognizance that to do so reaches the point of flying in the face of the Code.

Now, Mr. Mungovan, under 548(c) says, gee, this would

be nonsensical, I wouldn't come in and say, here I am, I'm a tort victim, because it would compromise 548 and that he's somehow making this a duty for them to do. I'm not suggesting remotely there's a duty on behalf of the investors who didn't know about it. That's a nonsensical -- that is a nonsensical point. What I'm saying is that to utter the contrivance that they have an unarticulated claim and that they therefore have it without ever asserting it, flies inconsistent with the notion of 548 itself. That's all. I'm not trying to over-blow it. I'm --

THE COURT: And presumably without the consequences of it.

MR. KAUFMAN: Without any adverse consequences.

THE COURT: Because the consequence of asserting the claim is the inability to recover on it.

MR. KAUFMAN: Precisely. Now, so, that --

THE COURT: Because of the bad faith.

MR. KAUFMAN: Correct. Now, I'm almost done, Your Honor. Mr. Mungovan says, this is going to wreak havoc. I mean, the reality is that in all of these cases, it's a tragedy. When you have a Ponzi scheme, whether it's Madoff, and we've all seen it on TV and played out, and while the injured plaintiffs, maybe they're too poor to even be here, the would-be recoverees here, and a lot of them have lost all their money, it's a tragedy for them. I'm not saying it's any luxury

here, that the people that are here are having to deal with the consequences and have no door knocked on. Some got all their money back. Others got some of their money back. It may be a difficult situation for everybody. It is not pleasant. But, the question is not whether it's pleasant or not. It's not a question of whether there's some kind of need to have adjudication. It's getting to what the law requires.

Second, I would say, to Mr. Mungovan's point about spending excess of the estate, a very small part of the estate's total commitment has been devoted to this process. One of the things that exacerbated it was all the debate about who was going to be on the committee and who could do this and whether we had an independent right to proceed and that cost us volumes. That's for another day, if it's ever. But, the point is, a very small factional share, well under ten percent, well under ten percent of the amount of money spent by the debtor estate, has been devoted to the pursuit of this action. And if it means recovering a substantial amount and a principal source for recovery for a lot of investors that have nothing, that's a cost of doing business. But, it is modest, very modest. A modest amount, a small fraction of our fees, have been devoted to actually the pursuit of this claim. And once we got into the position to have the right to do so and work through that, a small amount has been spent devoted, to that.

Okay. Now, let me turn finally to the 544, 548 set

of issues raised by --

MS. PASSYN: Ms. Passyn?

MR. KAUFMAN: Ms.?

MS. PASSYN: Passyn.

MR. KAUFMAN: Ms. Passyn. And I apologize.

MS. PASSYN: That's okay.

MR. KAUFMAN: That's bad of me and that's not good. Ms. Passyn. She made an impassioned argument that we're talking both sides of our mouth and without any further castigations attributable, that we can't argue it both ways.

Well, first of all, let's get to the end point. Obviously, the end point is whether, under establishing a constructive fraud where we have to show insolvency, whether under Whiteford Plastics, we have to demonstrate that either this is for the benefit of creditors or have the other view taken in the Bayou case that this is so akin that it's the same or, third, to satisfy Moore v. Bay requirement that there be at least a creditor in existence at the time the avoidance action that is being pursued occurs.

All of those are dependent, one way or the other, save for the Whiteford separate point, on the question of whether or not the estate was insolvent and whether these parties can be creditors. And the point raised by Ms. Passyn is, how do you have it both ways? Well, it's not difficult and it's not trickery or anything else, and aside from the plan

which you've disposed of. The simple answer is a question of, what is it that we're looking at?

On the one hand, we're looking at this Court in a judicial process, with open notorious full notice, notwithstanding what the woman who came up here earlier said, is doing, is under the plan, is validating the fact that people, save for those who got their money back, are now, for then, entitled to have a claim. That's what courts are all about. The fact that the claim relates back in time and is given rise to at the date they were induced to render or tender their money, is not inapposite or is not frustrative of anything we're saying. It is to say that this Court looks at the claim. The claim arises prior to the bankruptcy, well back in time. The Court is now acknowledging that claim and is giving debt status to it.

The fact that it's doing it now is not the same question of whether -- of anything other than to say, if I now, the Court, recast the state of play at the time that that transfer -- or that transfer into the estate occurred, and all of these claims came into the -- or all of these investments came into the estate, they were all worth, for years and years, and Mr. Phillips is quite right. You know, we're going to have to, at some point, prove insolvency at an earlier year, but we believe, and I believe Mr. Perkins is going to be able to testify and demonstrate through records that this was an

insolvent estate for a long period of time. Whether Mr. Phillips is right that it goes back to '99, I'm not a forensic expert and can't prove, but I am here to say that for a very long time, it was in one pocket, out the other, to somebody who wanted their money back.

And, so, the issue is, was it insolvent at various points in time? Well, Your Honor can take a look at all these claims that are now being blessed for having been defrauded, looking at then, whenever it is time, how much money was in the estate to deal with the claims that were X'd in at that time and determine that, in fact, it was woefully insolvent and that the monies paid were, like, you know, a hundred cents on the dollar --

THE COURT: But, the argument is, they weren't claims at the time. You're saying they're not a claim.

MR. KAUFMAN: They are --

THE COURT: If I understand the argument, that's the -- the argument is they're not a claim.

MR. KAUFMAN: No. The argument --

THE COURT: Your argument is they're not a claim.

MR. KAUFMAN: My argument is they were not a claim. My argument was that they were not -- that it wasn't a claim is not the argument. I'm saying they had a claim. The problem is not the claim, and as Mr. Mungovan said, umpteen different places we've acknowledged the claim arises as of the time that

they made an investment. We're not debating that they have a claim. It is the treatment of an unasserted claim. Now, that they have it and are asserting it, it's the treatment of it today. You can go back and say, yes, they had a claim. So, as I construct the balance sheet for 2002, there was $100 million chasing $4 million that was in the bank at the time. The case was totally insolvent.

THE COURT: But, it was a hundred million dollars of equity interest.

MR. KAUFMAN: But -- they're equity interests, Your Honor, but I'm saying they had -- it was an equity interest and there was an inchoate. That's the point. There was an inchoate ripe to assert that hadn't yet been asserted, but fairly done. If Your Honor now goes back and constructs the balance sheet of the company based upon now determining for back then, in open notorious fashion what the structure of the company was at the time, at the time the company was insolvent. There's no inconsistency. The mere fact that we're saying they were equity from the get-go doesn't mean that they didn't also have a claim.

The problem is not that they didn't have a claim. It's the transmutation to acknowledge the existence and pay on the claim without it being articulated. The difference between this Court and what happened is, Your Honor is now looking at it in full due process and saying, I now bless all of these

people for having a claim, and that claim relates back. What happened when the transmutation event happened, or the redemption event happened is, people were perceiving a totally different world. They thought they were just getting their money back and there was no fraud and nobody knew anything.

So, the question of creating the artifice of having -- this fact that there's a claim now is not inconsistent, at all, with the fact that the claim existed to begin with, just never ripened to a point of having been determined adjudicated, found, articulated, resolved as such and those two things are not inconsistent, whatsoever. If that inconsistency bedevils our case, then we're done. But, I submit to you that there is nothing remotely wrong with this Court saying, today, I hereby look at the situation and bless everybody, including all the investors who got snookered who didn't get a cent back, that you're all entitled to have a claim.

This was an insolvent estate. Let's face it, you were all defrauded. But, it's another thing to look at the date of the transmutation -- or of the redemption event and just with a flick of the wrist, say, we'll give you an unarticulated claim because it runs inconsistent with the whole notion that the process of making a claim out of an equity is not to be manufactured on the quick, you know, snap of the fingers. That's the essence of the case. And Your Honor has got to grapple with that because, I submit, that's where the

rubber meets the road. It meets the road both in terms of the 544 analysis and it is where the rubber meets the road in accepting the artifice of creating this artificial notion of the fact that they were recovering in respect of a claim when nobody knew anything remotely about a claim. That's where the case is.

In my view, it's a first impression. It's not contrary to anything. It's a first impression because we're really dealing with the first court dealing in an equity case where you have to struggle with that analysis. That's what I've been saying for a couple of years and I appreciate the Court's indulgence. Happy to answer any questions.

THE COURT: Why should the result be different because of the form of the transaction when the transaction is fraudulent?

MR. KAUFMAN: The result should be different, Your Honor, because it's in the nature of what they signed. Your Honor went back and you said it a few minutes ago. I'm not binding Your Honor to find that they're equity, but they executed equity documents. If we're going to basically say the distinction between equity and debt shouldn't matter when fraud obtains, then the whole notion of our jurisprudence goes out. I mean, there's always been a notion that creditors get paid first. You make a volitional decision in a case to invest. I can't control why, in one limited partnership -- or one hedge

fund case -- and I fully anticipated Your Honor asking this question, I mean, this is no surprise. Why, in one Ponzi scheme case where the parties invested in debt, Outcome A, in another Ponzi scheme case, they invested as equity, Outcome B? That is simply -- you know, the world is not perfect. Not everything comes out the same. There are consequences to executing documents that create a different dynamic.

If I have a right to payment -- if we're going to obliterate the distinction between a right to payment and say, oh, that's all really sort of one and the same as here's an equity money, you're managing my money one way or the other, it's to basically destroy the whole notion of documents and the purposeful nature of what people sign. And so I admit to you, Your Honor, that the Madoff people -- I thought at first -- I said, oh, my God, there's hundreds of billions of dollars or tens of billions of dollars of money that ought to be looked at and it turns out, it looks like the structure they made there was debt. It's serendipity. Those people may be unfortunately up -- a paddle -- without a paddle.

But, this case is not that and there are any number of other cases that are equity cases where the nature of the investment and the risk taken was one that put them in a situation that are not to be preferred and it's as simple as that. And I don't -- it's something that we recognized from the get-go was going to be existent and that, you know, this

case turns on equity versus debt and, gee, they signed these agreements. But, that's the nature of it and it's not really being harsh. And, in that sense, I don't find this harsh because, in reality, you come back to the notion of fairness.

If I'm an investor that's sitting in this room, why are you coming to bother me? This has been a tragedy for me. If I'm sitting out there talking to the 150 people who have lost $100 million and don't have one cent of it, some of them totally destitute, those people are saying, how could this happen, how do I -- why is it that I don't have some means of recovery? And the answer doesn't come from, gee, you're right because you got a perspective and the other person is right, leave sleeping dogs lie. The answer comes from, sometimes the law provides a remedy, sometimes it doesn't.

You know, in Stanford, they're looking at a situation where the trustee in that case -- by the way, it's not proceeding on an avoidance action, Mr. Mungovan, and I'm not saying this in a negative way --

MR. MUNGOVAN: It's a receivership proceeding, I understand.

MR. KAUFMAN: Well, no, it's not only that, but it's not on an avoidance theory. There's a theory under the SEC law that they can proceed to basically disallow unjustified gains, and so it's not premised on a fraudulent conveyance because Stanford is a debt case and what's happened in that case is,

the SEC has taken the position -- again, I know you're not bound by any of this -- taken the position that at least in that kind of case, we don't think it's cognizable that you ought to go against innocent creditors who invested. Well, that's fine. The SEC has not taken a position with regard to the equity cases or the distinction between the two and, even if it does, it's up to the courts, not the SEC, to make policy on this issue because it's a judicial issue of whether or not those are distinctions, one from another, that are merited.

It is to say that some cases -- sometimes the windshield wins and sometimes the bug wins and whatever -- whoever sang that and I screwed that up. What is that?

THE COURT: I can't help you out.

MR. KAUFMAN: Can anybody help me there? Sometimes you're the windshield, sometimes you're the bug.

THE COURT: Something like that.

MR. KAUFMAN: Well, you know, in this situation, Your Honor, the result is that the documents govern the outcome and the outcome is one that is not unfair and it ought to be followed because otherwise you compromise the entire distinction between debt and equity and undermine other principles in the Bankruptcy Code.

Thank you for the Court's indulgence. I appreciate it.

THE COURT: Thank you. Mr. Mungovan?

MR. MUNGOVAN: Just very, very briefly, Your Honor. Two very quick points. First, I don't want to beat a dead horse on the Ebby case, but if you look at the case itself, on the first page of the case, what the manager -- we'll call it the manager because that's what they call it today -- the fraudster was investing in the New York Stock Exchange Securities. That's a far cry from a debt in a bond type case which I think that the trustee's counsel really wants to characterize it into.

The asset manager is investing money. There's risk of loss of principle as a result of that investment behavior. There's no guaranteed return on the investment. Ebby is not a classic debt case in the sense of a bond or a promissory note. Ebby looks like an equity case. It looks like this case.

The second point, and very briefly, Your Honor, I think --

THE COURT: Truth be told, I really don't address this issue.

MR. MUNGOVAN: I would agree.

THE COURT: Truth be told, nobody except maybe AFI Holdings really addresses the issue in this case.

MR. MUNGOVAN: I would agree, Your Honor.

THE COURT: And truth be told, AFI Holdings really, as I think Mr. Kaufman accurately points out, it really doesn't address it. It just says, this is the way it is.

MR. MUNGOVAN: The key issue, Your Honor, is, it's a limited partnership. It's just like this case. Bayou is a limited partnership.

THE COURT: No, I'm saying -- I understand and I think Mr. Kaufman acknowledges if AFI Holdings was a decision of the United States Court of Appeals for the Eleventh Circuit, we would not be having this discussion.

MR. MUNGOVAN: I understand, Your Honor.

THE COURT: Or I wouldn't have to worry about it anyway, because it would be very easy for me to say --

MR. KAUFMAN: Move it on up.

THE COURT: -- take it on up because you're going to have to apply for cert.

MR. MUNGOVAN: I understand, Your Honor.

THE COURT: Okay. I think Mr. Kaufman has acknowledged that, so there's no real disagreement about that.

MR. MUNGOVAN: I'll move on, Your Honor. Last point.

THE COURT: No. I don't mean to cut you off or bring you up short, but I just want to make sure I've got a -- that I really understand these cases because I don't think -- as I understand this dispute and the argument that you all are making, these cases, the cases -- if you look at the cases on their face, facially, all of them support the position of the defendant, every one of them.

MR. MUNGOVAN: I would agree, Your Honor.

THE COURT: They all -- and I think Mr. Kaufman would agree with that, except Terry which doesn't -- which is not a Ponzi scheme case.

MR. MUNGOVAN: Correct.

THE COURT: So, they all support the position of the defendants. I think the trustee's position is, the only one that is a square holding is AFI Holdings. And I think he's right about that. I'm not sure.

MR. MUNGOVAN: I wouldn't necessarily agree with that.

THE COURT: The United Energy case is -- is that the one with the power modules?

MR. MUNGOVAN: Yes, Your Honor.

THE COURT: The United Energy case is close to Holdings because it was not a note obligation. It was some other kind of obligation. They kind of put all that one together.

MR. MUNGOVAN: Correct.

THE COURT: So, that was sort of an investment. So, maybe that's sort of an equity and right this minute I can't remember -- the other one was the Independent Clearing House case, right?

MR. KAUFMAN: That's a debt case.

THE COURT: Well, we all agree that's a debt case?

MR. KAUFMAN: When I read to Your Honor -- I don't

mean to interrupt.

MR. MUNGOVAN: I don't believe so, Your Honor, but I think from the point of view from the defrauded investors group, the equity versus debt distinction is meaningless. The courts haven't looked at it. They haven't decided it.

THE COURT: Why should -- presumably, as I understand it, you're a bankruptcy expert, right?

MR. MUNGOVAN: No, I'm not, Your Honor.

THE COURT: Oh, you're not?

MR. MUNGOVAN: I'm learning. Let's put it that way.

THE COURT: Oh, I thought you were a bankruptcy guy.

MR. MUNGOVAN: I'm a business litigator, a securities litigator. I litigate blown hedge funds for the most part.

THE COURT: Okay. Well, then, in any event, I think most bankruptcy lawyers would agree with me that if I have stock in a corporation and I get my stock back when the corporation is insolvent, that's a no-no. That just doesn't happen.

MR. MUNGOVAN: I agree, Your Honor.

THE COURT: That's a fraudulent conveyance.

MR. MUNGOVAN: I agree, Your Honor.

THE COURT: Okay. So, why doesn't that rule apply here?

MR. MUNGOVAN: It doesn't apply here, Your Honor, because in this context, the investors were defrauded at the

time that they made their investment.

THE COURT: Why does that make a difference?

MR. MUNGOVAN: Of course it makes a difference.

THE COURT: Why?

MR. MUNGOVAN: Because the issue is, a claim arises and the way that the Bankruptcy Code looks at a claim and defines value --

THE COURT: I understand. I understand all that argument and I'm asking the policy question. Why should it make any difference? Why does it make any difference?

MR. MUNGOVAN: The issue of why an investor who invested in a Ponzi scheme that was a fraud from the beginning should be treated differently?

THE COURT: Why somebody who makes an equity investment gets treated the same as somebody who makes a debt investment? Why do the normal corporate equity entity -- maybe there's a dispute about whether the same principles apply to an LLC or an LLP, but why do the normal principles that preclude withdrawal of capital from an insolvent entity not apply? That's the -- the trustee raises the issue that the normal rules applicable to withdrawal of capital or return of capital from an insolvent entity should apply here, I think. Right?

MR. KAUFMAN: Correct, Your Honor.

THE COURT: If you boil it all down, that's what it boils down to.

MR. MUNGOVAN: Right. And where there's an insolvent entity, where there's a shareholder, and as you pointed out the example is the shareholder takes cash out on a dividend basis, the distinction here is that --

THE COURT: Or return of capital.

MR. MUNGOVAN: Return of capital, whatever it is. The distinction here is that there's a corollary claim that these investors have in Ponzi scheme cases, okay, that offsets that other claim.

THE COURT: But, why does that trump the rule --

MR. MUNGOVAN: Because this is --

THE COURT: Terry, presumably, tells us that the fraud rule doesn't trump the withdrawal of capital rule.

MR. MUNGOVAN: Because in this context, Your Honor, the way that Congress wrote 548(c) and defined "value" and defined "debt", they created this opportunity for a defrauded investor who might be equity or debt, it doesn't matter from our view, but in the context of an equity investor, that investor, because they were defrauded ab initio, from the beginning, they should be treated differently than an investor who made an investment and had a market loss.

THE COURT: Well, why isn't the defrauded investor in Terry treated differently?

MR. MUNGOVAN: Because the Terry investor did not invest in a fraud scheme that, at the time that invested, they

took a loss immediately. That's the key distinction.

THE COURT: Well, how could they have a restitution claim? If they invested properly, there's no fraud in the investment. They got stock.

MR. MUNGOVAN: Right.

THE COURT: The fact that they later got defrauded doesn't change -- that doesn't -- that gives them a later --

MR. MUNGOVAN: I don't know that they got defrauded in Terry, Your Honor. The issue in Terry, I submit, and I could read it again and brief it further, but the issue in Terry is, they went after the shareholders who received a dividend in excess of their investment. It had nothing to do with the return of capital. It was a dividend payment.

THE COURT: So?

MR. MUNGOVAN: And so the distinction --

THE COURT: Isn't it the same rule?

MR. MUNGOVAN: No, Your Honor.

THE COURT: I mean, if you can't get a dividend, can you get --

MR. MUNGOVAN: Because the issue in that case, Your Honor, is there's no offsetting basis to say, as here, I have a claim that I'm setting off against.

THE COURT: Why not? Why would the Court talk about a restitution claim unless they asserted one?

MR. MUNGOVAN: I have to read it again, Your Honor,

to be honest with you. I'm happy to brief it further. I think the key distinction though here, unlike in the Terry case, is we have a fraud claim from the beginning. I'll have to look at the restitution aspect of the Terry case and I'm happy to submit a brief on it, a very short one.

The other point I want to make very briefly, Your Honor, and I appreciate your indulgence, is that the trustee's counsel talks about this -- I hate to use it -- the presto chango, the conversion from an equity to a debt interest.

THE COURT: It's not quite as elegant as his other terms, is it?

MR. MUNGOVAN: Right.

THE COURT: Give it a little time. He'll come up with --

MR. MUNGOVAN: The transmutation.

THE COURT: By the time you'll all get up to the Eleventh Circuit, he'll have a fancy term for it.

MR. MUNGOVAN: I have no doubt, Your Honor. Here's the point that I want to make it about it.

THE COURT: Maybe the transfiguration would be --

MR. MUNGOVAN: How about trans-substantiation, Your Honor?

THE COURT: Or trans-substantiation.

MR. KAUFMAN: How about trans -- what's that word? Trans?

THE COURT: Transmogrification or something?

MR. KAUFMAN: Yeah, that one.

THE COURT: I'm sure he'll have --

MR. KAUFMAN: I can't pronounce it.

THE COURT: I'm sure he'll have something that he'll develop as the term to describe that concept.

MR. MUNGOVAN: No doubt. The point that I want to make, Your Honor, is that there isn't a changing of the interest. There's a separate claim that arises. They still hold the equity interest. The example is if they invested a million dollars, and at the time they invested the million dollars into the Ponzi scheme, rather than having it go to zero, it's worth $500,000. Their net equity is $500,000. They have a corollary claim for $500,000 for rescissionary damages because they're still holding, under Mr. Kaufman's view, an equity interest for the $500,000 that was not lost. They sit side-by-side. It's not changing one into the other. That's the view of the defrauded investor defendants, Your Honor.

Again, thank you for your time. We appreciate if very much.

THE COURT: You're welcome. Thank you. Does anyone else wish to be heard? Ms. Steinfeld?

MS. STEINFELD: Good afternoon, Your Honor. I was going to sit quietly, but I'm a lawyer, Your Honor. Let me introduce myself. In the terms of this case, I represent the

Withers. Ms. Withers is a living defendant; Mr. Withers is a deceased defendant. And, right now, the situation of my adversary is it's currently in default. I would move to set aside the default and we're trying to settle the adversary and I haven't filed anything vis-a-vis the motion for summary judgment. I've been monitoring today and I just wanted to make a couple of comments vis-a-vis the summary judgment motion.

I, too, as Mr. Phillips' and most lawyers' concern, that should my default -- you know, I'm anticipating we'll either settle or we'll get set aside and we'll be defending and I don't want today's ruling, as the Court has said, you know, I'll be able to raise my defenses. I want my defendant who is currently an unemployed schoolteacher in Oregon to be able to claim her value of the money that she put into the investment.

I just want to raise the issue that my schoolteacher who was investing with the principal of IMA, she's an investor who wasn't aware whether she was doing debt or equity. She was just going through an investment advisor and making investments and I wanted to just put that out on the table as, you know, amongst all these defendants in all these hundreds or 150 adversary proceedings, that she wasn't aware or cognizant of whether this was debt, equity, what it was she was doing. Her investor -- investment advisor, said, do X, and she did X, and she said he said --

THE COURT: Why would that make a difference?

MS. STEINFELD: You know --

THE COURT: Are you saying if somebody invests -- had the good fortune to invest a lot of money in General Motors in 1950 could say -- well, I guess, now that wouldn't make much difference, would it?

MS. STEINFELD: You know, I'm just -- you're saying debt versus equity versus trying to make this distinction, limited partnership agreements. I don't think -- she hasn't sent me a signed agreement. I don't think she has a signed agreement. She --

THE COURT: May not, but the point is that may be important if there's no written agreement.

MS. STEINFELD: Correct. I just --

THE COURT: If there's a written agreement, somebody becomes a shareholder --

MS. STEINFELD: But, it's not the situation like most fraudulent transfers where you've got these partners and the partners are controlling things and you've got partners who are doing things and they have all this knowledge and they're taking things out. So, I just wanted to throw that out on the table.

THE COURT: Okay. I understand.

MS. STEINFELD: As I say, I'm new to the case, Your Honor, and I just wanted to put that out there. Okay?

THE COURT: Okay.

MS. STEINFELD: So -- and then also it strikes me, and I also, you know, said I'm new and I'm just commenting at this point, that most of the creditors at this point, a creditor being either investor, or tortfeasor or however you want to define it, that the vast majority of them are going to be either unpaid claimants or paid claimants and that there may very well be a solvency issue at some point in that there's a huge group of investors that, if the trustee wins on this argument, that then it may be a solvent estate and I thought I read a brief on this point and that hadn't come up today and I just wanted to reiterate that point.

THE COURT: Okay.

MS. STEINFELD: My points. Thank you, Your Honor.

THE COURT: Well, I think that goes back to the presto chango argument.

MS. STEINFELD: Correct.

MR. KAUFMAN: Well, let's put it this way. From her lips to our ears. If we ever recovered enough to make this estate solvent --

THE COURT: You'd be a hero.

MR. KAUFMAN: -- we have a lot more claims out there than I think we have because, as best I can tell, it's about $20 million and that's unfortunately chasing about 80 or $70 million worth of claims. So, I think the solvency issue, not in our lifetime in this case, but understood.

THE COURT: Go ahead.

MR. STEIN: Your Honor, I hadn't planned on speaking today, but again --

THE COURT: It's not necessary that anybody speak.

MR. STEIN: As keeping with the theme. I just want to take a crack at that question you had asked and hopefully I don't fail miserably.

COURT CLERK: Could you remind me of your name?

MR. STEIN: Sure. I'm Kevin Stein. I represent Dr. Eric Randolph and Laverne Hamilton Jones.

The question you posed about Terry and dividends and why a dividend would be different than a return of capital, simply put, a dividend is much more like fictitious profit. It is a type of a distribution of a profit, as opposed to return of principle.

THE COURT: True, but you can't return capital in an insolvent entity before you pay your creditors, can you?

MR. STEIN: Well, that kind of dovetails into --

THE COURT: If you're a director, don't you get to pay that back?

MR. STEIN: If you're a director?

THE COURT: If you authorize that? If you're a director of a corporation and you permit a redemption of stock when the corporate is insolvent, doesn't the corporate code of just about every state prohibit that?

MR. STEIN: The corporate code would allow the other stockholders, or potentially a creditor, to unwind the distributions, but I'm not aware -- whether there's a breach of fiduciary duty against the director, we're going down a different road. But, I'll point out one other --

THE COURT: Well, the point is, it's a recoverable transfer, isn't it? Somebody can recover that transfer.

MR. STEIN: If a dividend is made from an insolvent corporation --

THE COURT: No. Let's assume there's a corporation that has a thousand shareholders. Each of them has one share, and the assets of the corporation are $100. And so the management says, well, we like these hundred shareholders. We're going to give them $100 to redeem their shares. What do the other 900 shareholders do?

MR. STEIN: The other shareholders have a right to unwind those distributions.

THE COURT: So, that everybody gets ten percent?

MR. STEIN: Correct.

THE COURT: Why shouldn't that apply here? That's my question.

MR. STEIN: Because of the fraud.

THE COURT: Why does the fraud make any difference? Everybody's been defrauded.

MR. STEIN: Well, we've been talking about

restitution, but let's also just briefly mention recission. Okay?

THE COURT: What's the difference?

MR. STEIN: Under Georgia's Blue Sky Laws, the Blue Sky Laws, if you're defrauded investing in security, whether it's a note --

THE COURT: Right.

MR. STEIN: -- or an equity --

THE COURT: Okay.

MR. STEIN: -- it's a security --

THE COURT: Right.

MR. STEIN: -- under Blue Sky Law, or under state contractual law, simple fraud, the inducement theory, under either scenario, you have a right of recission.

THE COURT: Okay.

MR. STEIN: What's the remedy for recission? Give me back what I gave you, dollar-for-dollar.

THE COURT: Right. So, tell me why some people should get all their money back and others shouldn't.

MR. STEIN: That's the way it works.

THE COURT: That's the way it is.

MR. STEIN: Absolutely.

THE COURT: Too bad.

MR. STEIN: It's just like the 90-day preference rule.

THE COURT: Too bad. See Ebby.

MR. STEIN: Why do we say that a creditor who receives a payment on an antecedent debt on the 91st day before bankruptcy keeps it and the one on the 89th day doesn't keep it? It's just that's the way the line was drawn.

THE COURT: Okay.

MR. STEIN: Thank you.

THE COURT: Anyone else want to be heard?

MS. PASSYN: I'm sorry. Just one more point on that. Also, there's a difference between denying a claim and saying that you're not allowed to be paid out of the estate and then allowing the estate to go into other people's pockets and get money back. And that, just like the 90-day preference, there's just policy difference on both of those. But, I want to go back to the point --

THE COURT: What's the policy difference? Where do I find that policy difference?

MS. PASSYN: Well, in 510(c). That's why they put equity holders behind, because there's a difference between allowing people -- allowing the -- forcing the estate to pay people that are equity holders and then, on the other end, allowing the estate to go into their pockets and bring them back, to sue them and then go into their pockets and say, now you've got to pay us back and we brought these claims.

THE COURT: But, the question is, why not?

MS. PASSYN: Because it's not that --

THE COURT: Because they happen to get paid first? I mean, that's the basic question and, in fact, Ebby raises that question.

MS. PASSYN: Well, I want to --

THE COURT: They kind of say, it's not before us.

MS. PASSYN: I just want to raise one issue that --

THE COURT: Hold on.

MS. PASSYN: Sorry.

THE COURT: Don't try to dodge my question.

(Laughter)

MR. KAUFMAN: That's why I'm not getting up again.

THE COURT: Maybe, Mr. Stein --

MR. STEIN: Yes, Your Honor.

THE COURT: Mr. Stein just -- he had the answer. That's the way it is.

MS. PASSYN: That's the way it is.

THE COURT: That may be the answer.

UNIDENTIFIED SPEAKER: To quote Bruce Hornsby.

THE COURT: But, Ebby says it may be that exact equitable equality among the victims of Young could be only attained only in an equitable proceeding under which all of Young's customers would be charged with all payments made to them and such contribution among them required as would be necessary to give each victim the same percent of the money

paid in. That's what Ebby said right before saying, but that point is not before us. Maybe the trustee has found a way to make that happen.

MS. PASSYN: Well, Your Honor, one thing the trustee has not done is explain to me exactly why these claims that he acknowledges that we have relate back, for his purposes, to the time of the transfer, yet they do not relate back for the defrauded investors' purposes, and that's just the one point that I wanted to make.

THE COURT: That is a little flaw in the slaw. for him, isn't it? Maybe it's just because that's the way it is.

MR. KAUFMAN: The only other comment I would make about the way it is, is the 90-day preference period applies to the issue of claims and it basically sets up a statutory structure. There is nothing in the Code that sets up any statutory structure with regard to the type of circumstance here. So, while it may just be the way it is, that somebody drew a line and said, I'm going to look back so far, other than that, creditors can get paid in advance and that's the whole proposition. The whole proposition is, creditors have from 500 years of legal jurisprudence entirely different rights. They have rights. They have obligations owed to them. It's the nature of contract as opposed to people who are equity investors who hold interests. And that fundamental distinction can't be just whittled away and that's the essence of this

argument. And the fact that you can somehow constrain for a 90-day preference period to avoid craziness of a run on an institution to say, I'm not going to let even all creditors get paid, does nothing to suggest that equity distinctions ought to be ripped asunder and rendered meaningless, which obviously the thrust of their argument would create. Thank you.

THE COURT: Mr. Mungovan, if -- suppose the trustee recaptured his claims to -- suit to recover improper returns of capital.

MR. MUNGOVAN: I'm not sure I understood Your Honor. Could you state it again?

THE COURT: Well, instead of having a fraudulent transfer theory, what if he had an improper return of capital? That's not his theory, but how would that change the result?

MR. MUNGOVAN: What would be the theory of the improper return of capital? What's the legal --

THE COURT: The limited partnership returned capital to the partners while it was insolvent.

MR. MUNGOVAN: Under the limited partnership agreement it says that the limited partner has the right to withdraw according to the amount that's in the capital account. And the capital account was calculated by the manager of the limited partnership. The investor had no knowledge that the capital account was fraudulently inflated. So, what I would suggest is that there's no such claim in this case for an

improper distribution of capital to a redeeming investor. Under the contract, the investor has the right to withdraw his capital. And if you look in the limited partnership agreements and the LLC agreements that are attached to the trustee's affidavit, it's quite clear that the right to withdraw is express in the contract.

MR. KAUFMAN: Just one --

THE COURT: Mr. Kaufman.

MR. KAUFMAN: The right to withdraw is only that which you're owed and it can't -- and the fact that you think you're owed X, if it's belied by the fact that you're only really, when all is said and done, owed one percent of X, you're entitled to withdraw that. I mean, the fact that, for example, in the Ebby case, the case that Mr. Mungovan says is startling or eerily -- I think was your word -- like this case. The difference is, that case wasn't one where people signed equity membership interests. It was one that had no indicia of limited partnership, partnership, shareholder interests whatsoever. It didn't have those indicia. This clearly has. And so --

THE COURT: Well, interestingly, it does have indicia. I mean, 1926 -- 24, was possibly a long time before a lot of --

MR. KAUFMAN: Just before I started.

THE COURT: Just before you started. But, is it

debt, is it equity, all those kind of arguments seem to start beginning in --

MR. KAUFMAN: All I'm saying is --

THE COURT: Well, hold on. The idea that you're going to get this beginning earnings and profits -- where does it say that?

MR. KAUFMAN: You can still get that in a debt case, Your Honor. It's just all a question --

THE COURT: You're supposed to be buying and selling securities. I mean, you all both accurately describe the case. You just emphasize different parts of it, obviously.

MR. MUNGOVAN: Your Honor, the key word is it's a pool.

THE COURT: Yes.

MR. MUNGOVAN: It's a pooled investment and that's what a limited partnership -- that's how these funds work. They're pooled, undifferentiated interests. They put their money in and all of the money is pooled and invested by the manager. That's how a hedge fund works. That's how these documents were drawn up by Seward and Kissel. Okay. That's what a pooled investment is.

MR. KAUFMAN: Except that in this case there were equity subscription agreements and documents signed saying that they were members and they were subordinated to creditors and they are not concomitant things, at least in the Ebby v.

Ashley. Clearly, Mr. Mungovan is right to the extent that there are elements of it that looks like it's a pool investment. They're doing the same kind of thing. But, the distinction is -- and, listen, we can only put so much weight on Ebby because, frankly, when Ebby is all said and done, it doesn't get to the issue other than acknowledging that there was a claim. It doesn't really reach our issue of so what do you do to the extent there is --

THE COURT: Well, this was only for the profits, right? The excess money, right?

MR. KAUFMAN: Yes. That's all it was. But, I'm saying --

THE COURT: So, it's all dicta anyway.

MR. KAUFMAN: It's all dicta anyway, but --

MR. MUNGOVAN: I don't agree. You can't get to the excess profit and have to return the profit without understanding and acknowledging that you don't have to return the principal. They're conjoined together so it's -- respectfully, Your Honor, it's not --

THE COURT: The trustee wasn't trying to get the principal back.

MR. MUNGOVAN: But, the Court doesn't -- Your Honor, the point is, whether the trustee is trying to get it back or not, in order to decide the profit has to go back, the Court would have to decide also that it's not appropriate to

recapture principal.

MR. KAUFMAN: I think one thing could be said about Ebby and that is, if anybody wants to make some case being seminal that's answering all these questions, it leaves a lot more murky, by anybody's examination, a lot more murky than it solves. It doesn't address a host of the issues we're raising here. Whether it's dicta, whether it's passing, whether it has some effect, it was the start of all of this and that's why it's interesting. But, beyond that, I think it's relegated to the fact that it's basically one line of jurisprudence that you've got to look at in its context.

Really, at the end of the analysis claims squared or not claims squared, what's the difference between this case and any other equity distribution case and can articulation -- without articulation, can you use that as the means to get around the for-value?

THE COURT: Okay. Anybody else?

MR. MUNGOVAN: Unless you have any other questions, Your Honor, thank you.

THE COURT: If I quit talking, maybe you all will.

(Laughter)

THE COURT: Why don't we take a short break and then I'll come back and we'll see where we are. Let's take about a ten-minute break.

MR. KAUFMAN: Thank you, Your Honor.

(Recess)

THE CLERK: Okay. We're back on the record.

THE COURT: All right. I have read all of the briefs and I have looked at most of the cases. I have studied this issue. I'm not ready to rule today.

I don't think I have anything to add to the arguments, so I do not intend to write the next -- I don't intend to write the definitive order on this issue. So, when I issue an order, which I hope will be promptly, it will be short. I don't intend to try to parse through all of the issues step-by-step. It will probably just be either -- the presto chango theory looks pretty good to me, or the consensus view works.

In that regard, I want to thank the lawyers, particularly in this case, because the briefing and the oral advocacy has been outstanding, in my judgment, and it's a treat to have that. I thought the briefs, in particular, on both sides fairly, accurately, reflected what was in the cases. I know we all disagree about what they say and what the import of them is, but I thought that there was -- for the most part, you all focused on the relevant cases, the relevant authorities, the relevant points in the cases, and by the time I had read the briefs, I had -- without reading the cases, I had a clear understanding of what the issues were and what the positions of the parties were. And so I very much appreciate that and I

appreciate the trustee on his side, or maybe this was a joint effort and, if so, I commend the joint defense group and others who participated.

But, the idea of getting all of this teed up in one proceeding, I also think was a very good idea and was at least very helpful and made it easier for me. So, I appreciate that, as well, and I do think all of the parties have been very helpful in that regard and I do appreciate it.

I want to point out, because it's been said, and I think it was part of advocacy, and the trustee's position has been criticized and I've, perhaps, had a little fun with it myself, but I think the trustee's position, contrary to Mr. Mungovan's advocacy position, is not fundamentally illogical. I think it is a well thought out position. I think it is a possibly persuasive position. I'm not saying I -- I have not decided that I agree with it. Don't anybody get all excited and happy on this side or disappointed on this side. I do not by that statement to make any observation, other than I do not think it is an argument that can be addressed out of hand. I do not think it is an argument that any of the cases have definitively and appropriately addressed. I don't think it's been -- other than maybe in the AFI Holdings case. The other cases don't seem to really focus on this particular issue. They say things that support the defendant's position to be sure and they therefore indicate that that is, in fact, the

consensus view, which it certainly appears to be.

So, anyway -- and I did -- Mr. Kaufman, I did think your -- notwithstanding Mr. Mungovan's quivels with it -- I thought your terminology, although not accurately descriptive of what the law is, I thought that the terminology accurately described the concepts that you were arguing and advocating in an appropriate way. So, the theory is articulate and we'll find out whether the law supports it.

I wanted to go over to make sure that I include everything in the order that this does not cover. It does not cover good faith. It does not cover any statute of limitations problems. I'm assuming the existence of a Ponzi scheme, but I'm not deciding that issue. And is there anything else that I need to -- and anything else that I said we're not covering and I'm not deciding, and I'm still not deciding, but is there anything --

MR. KAUFMAN: Whether any particular investor is equity; Mr. Phillips' point.

THE COURT: Okay. Thank you. Whether any investor is equity. Okay. Anything else I need to include? Yes, sir?

MR. BERNARDINO: Your Honor, the corollary would be whether any particular investor had a claim.

THE COURT: Okay. Anything else?

MR. MUNGOVAN: One issue, Your Honor. I have not spoken about it with Mr. Kaufman, but I believe that we had an

agreement that after the decision was rendered that we would stay the proceedings --

THE COURT: We'll come back to that.

MR. MUNGOVAN: -- one way or the other.

THE COURT: Let me -- I'll come back to that.

MR. MUNGOVAN: Okay. Thank you, Your Honor.

THE COURT: Because we're talking about wanting to do an immediate appeal or something, or an interlocutory appeal, so I want --

MR. MUNGOVAN: Correct.

THE COURT: We'll talk about both of those issues. Anything else I need to exclude from the --

MR. KAUFMAN: Profit. Profit.

THE COURT: Whether excess profits are recovered.

MR. KAUFMAN: Yeah, except, you know, as Your Honor indicated, if we were to prevail, then profit would be gone. If we lose, then the issue of profit would come back on a separate document.

MR. MUNGOVAN: We agree, Your Honor.

THE COURT: Okay. Anything else?

MR. PHILLIPS: Your Honor, I think solvency -- all that stuff, the 548, the actual fraud and constructive fraud, was one of the elements of solvency, but I think that's tied up in the Ponzi scheme. I think that's what they would say, that it's a Ponzi scheme that brings the insolvency.

THE COURT: Would it be -- it would be helpful to me if you all could do it. Could you all put together a proposed part of an order which would say what this order does not cover and just submit that to me? So, I mean, I think I understand what --

MR. KAUFMAN: Well, why don't we make a stab and then we'll circulate it. If others will give Mr. Bates and Mr. Mungovan their cards, if they want to be heard about that matter, we'll circulate it to them.

MR. MUNGOVAN: We have a joint defense group, Your Honor, so --

THE COURT: Okay.

MR. MUNGOVAN: -- we can be the point of entry for the investor/defendant side, and Mr. Kaufman and I can work together or our firms can do it.

MR. KAUFMAN: Actually, Mr. Bates. I'm going to be out of town in the next week, but we'll --

THE COURT: If you'll just send me a paragraph or two.

MR. KAUFMAN: Right. We understand.

THE COURT: Send it to chambers by WordPerfect, Word. Then I can incorporate it in an order. It doesn't need to have a caption or anything else on it.

MR. KAUFMAN: We understand.

THE COURT: That will be helpful to me. Okay. I've

already ruled on the claim preclusion issue, so you all know that. As I said, I do not intend to get any further into the -- I don't intend to write the next definitive opinion on this, or the first definitive opinion, for that matter, because I think the arguments are well stated in the briefs and I really -- it fundamentally comes down to, I guess, a determination of whether the rule relating to equity distributions trumps the rule in Ponzi scheme cases and whether fraud should make a difference in the application of those equity rules. And that's what the analysis involves, I think. But, in any event, I will deal with that in a written order that will be short.

Now, I'm hopeful of getting this done fairly quickly so, when it gets done, where -- do you all want to go to the Eleventh Circuit?

MR. KAUFMAN: I think that was the consensus.

THE COURT: Is that the idea?

MR. MUNGOVAN: Yes, Your Honor.

THE COURT: Okay. How do we make that happen?

MR. KAUFMAN: I think there's a procedure for you to designate that as appropriate for immediate review in the aid of the parties. I don't remember the Code section. Maybe Mr. Bernardino or somebody else has that.

THE COURT: Can I do that in this order, or do I do that at some later point?

MR. KAUFMAN: I think we're prepared. I don't think

there's any real reason. Whichever way it comes out, there's going to be an interlocutory appeal desired by either side. So, perhaps what we ought to do, if this is not presumptuous, is, we'll get with Mr. Mungovan and we'll find the requisite appropriate language and we'll suggest that to you. Obviously, you can choose to modify it as you wish, but we'll have the requisite authority in there and report the magic language that will maximize getting there. That doesn't mean that they have to take it, as I understand it.

THE COURT: No, I think that's right.

MR. KAUFMAN: I mean, you ask "mother, may I?" and then they say whether they will or not. And I guess it's up to us to sort of frame the issue and to suggest -- and, you know, my guess is that if we say this is going to significantly save costs at this level, and ask Your Honor to adopt it, which would be agnostic and neutral, just to recognize it on both sides, that will probably help facilitate. So, we'll try to work on language about that.

MR. MUNGOVAN: We agree, Your Honor.

THE COURT: Well, I will state before I rule that I think resolution of this issue will materially advance the conduct of this litigation for all concerned. I think resolution of this issue will materially make it easier for all of the courts because we've got this one proceeding set up. We're going to have an appeal in this proceeding. We'll have

one appeal instead of multiple appeals, and --

MR. KAUFMAN: We'll so note in the proposed language we send to you.

THE COURT: So, I will -- I make those findings ahead of time and I'll make them afterwards. Mr. Phillips?

MR. PHILLIPS: Well, one comment, Your Honor, was brought to my attention, which I referred to before in our statute of limitations brief. I haven't had any discussions regarding the stay of all actions, but we would ask -- that's been fully briefed for awhile now, so we would ask that that not be stayed by any potential ruling you would have on --

THE COURT: We now have a stay in effect, is that right? Do we have a stay in effect pending this determination?

MR. BERNARDINO: Your Honor, Colin Bernardino for the trustee. Yes, all adversaries are stayed, although you had previously allowed defendants, I guess, to file dispositive type motions.

THE COURT: Right.

MR. BERNARDINO: Which is why we have the statute of limitations motions. There is one to which the trustee has not responded to yet, although I think the briefing is complete on and it's four or five adversary proceedings, but otherwise, those proceedings are stayed.

Your Honor may recall we came before you maybe two months ago or so and had tried to set up a schedule to address,

I guess, you know, maybe the trustee's prime facie case, and at the time, you know, you said, well, let's wait and have the briefing done but that we would, I guess, you know, revisit that. This may be the appropriate time to revisit that. I think it's the trustee's position that we'd like to go ahead and -- you know, we don't see why we should stop or continue to delay. That that issue, no matter what the result of for-value is, will need to be addressed.

MR. KAUFMAN: You're referring to the statute of limitations?

MR. BERNARDINO: I am actually referring to the trustee's prima facie case.

THE COURT: So, you would want -- so, what? You want the cases to proceed at this point?

MR. BERNARDINO: Your Honor, we had discussed previously a method, and perhaps this miscellaneous proceeding would be the appropriate venue, forum, in which we would open up the books, allow the trustee to be deposed, you know, ideally, only once. It could be, you know, a multi-day event, you know, but it would depend -- although it could certainly work probably better if there was a joint defense group who would lead the charge. You know, that way, it doesn't, you know, subject the trustee to multiple, duplicative depositions.

But, basically, you know, the trustee's position is that, you know, with the cautionary, you know, things that have

been said, we believe that most of what we need to do to prove up a Ponzi scheme has already occurred, at least from a discovery standpoint, certainly, and so it would most be the defendants taking discovery on this issue. Give them 60, 90 days, allow them to take their discovery, either documentary, interrogatories or deposition, or if there have to be a few depositions, and then let's have a trial on that limited issue.

THE COURT: On the Ponzi scheme issue?

MR. BERNARDINO: Whether it existed. Yes.

MR. KAUFMAN: Your Honor, with all due respect to Mr. Bernardino, I'm not sure -- and I have to talk to the investors' committee -- but I understand Mr. Phillips' point on the statute of limitations. It's a legal issue and I don't think it requires discovery and --

THE COURT: Well, it's dispositive. If the statute's run, he's out.

MR. KAUFMAN: Well, he's out and, you know, to the extent that there is some definitive way that somebody can get out on the statute of limitations, and the Court says it can't go back as long as X, but can only go back as Y, I mean, that's a pure legal issue which I don't think it's proper to frustrate a party from doing.

That said, and I know I'm not in concurrence with the trustee here so I'm wearing my investor committee hat, the only thing I'm concerned about is if this value issue -- and I

understand that the trustee takes the position that it has a number of potential otherwise good faith issues so that it wants to litigate a number of issues so that it can ultimately get to good faith and argue that pretermitting the value or even assuming arguendo, the value doesn't work, that the estate can go ahead and collect. And I'm not insensitive to the need to move it ahead.

I am sensitive, on the other hand, to the expenditure on both sides of Mr. Mungovan's group taking the discovery and the estate spending money because both sides are now spending money, whereas I think if the Eleventh Circuit decides the issue -- and this, I'm pretty sure, is the position and I'm not asking the Court to decide today and, frankly, what I'm going to say is that maybe what we need to do is have a very short briefing schedule, see whether we can reach agreement. If we can't, come back and present because the going up on interlocutory appeal is one issue. It seems to me it's a separate issue as to what gets stayed. We ought to see about it.

But, my tentative thinking is, the investor's committee is going to say, why spend money on that, because as they view it, without prejudice to the good faith issue, if value doesn't prevail here and on appeal, then the cost benefit analysis may not be there to want to really support going forward. On the other hand, if we're prevailing, then full

speed ahead. And as much as we'd like to know now, and because we've been in it for three years, it just seems to me we would be spending a lot of fodder doing all that, that may be premature no matter how Your Honor rules until the Eleventh Circuit tells us, all of us, where we come out.

But, again, I don't want to prejudice Mr. Bernardino, the trustee, or anybody else. I just think, you know, having said what I've said preliminarily, we ought to see if we can reach agreement on it. If not, brief it in a short time.

MR. BERNARDINO: Your Honor, if I might respond? We're certainly sensitive to these issues. However, I don't think Your Honor can guarantee when the 11th Circuit is going to issue an order on any appeal, you know.

THE COURT: No, I don't think I would try.

MR. BERNARDINO: And, so, if Your Honor -- I mean, if the plan committee is suggesting that we just wait a year, two years, I think that's -- I don't think that's very wise from the trustee's perspective. And, you know, with all due respect, Mr. Kaufman and the plan committee doesn't make the decision as to whether the trustee continues to litigate this matter.

MR. MUNGOVAN: Thank you, Your Honor. Just on behalf of the Nixon Peabody clients which are Laird and the Curtis family, because I'm not authorized to speak on this issue for the other defendants, I agree with Mr. Kaufman on this issue.

I think what I heard Mr. Kaufman say is that we could revisit it at a period of time. Maybe that period of time is 60, 90 days. Once we see whether the Eleventh Circuit is willing to take this matter and if we have some insight into how long it will take to adjudicate at that level, we could come back, say, at Thanksgiving or around that time and revisit this issue of a stay. And I think that that addresses Mr. Bernardino's concern about hanging out there for a year. So, that would be my proposal.

I understand that Mr. Kaufman has to speak with the investor's committee, but I think we should evaluate what the investor's committee wants to do. We can talk on the joint defense side. But, for my clients, we would advocate some period of a stay that can be revisited after some reasonable period. Thank you.

MR. KAUFMAN: I certainly respect Mr. Bernardino's observation that it's the trustee's case to proceed with or not. But, you know, it is a function where the investor's committee -- it's their money that's obviously at wait here and, that said, I'm not trying to suggest how I come out on this because how I come out is dependent up on how the committee comes out. So, it's a slight variation. I think Mr. Mungovan's idea of maybe an interim wait and see may be the ultimate disposition.

All I was saying is today is not the day to agree

what ought to be stayed and for how long. I think we ought to collectively talk amongst ourselves -- talk amongst yourselves, to see whether we can reach a resolution about it that works for everybody. And, if not, come back on a very shortened basis where Mr. Bernardino and the trustee will certainly have the right to say what they want to propose. Anybody else, if we don't have an agreement, can say what they want on whether it's the statute of limitations issue or on pressing ahead with the case.

THE COURT: Well --

MR. KAUFMAN: And I'm not trying to protract this. I'm just saying, you know, a couple of weeks, make sure we have enough time, and then -- just my thought as opposed to trying to wrangle it today because I really don't have authority to speak as to what my client would want to do having heard what Mr. Bernardino's idea is.

THE COURT: Well, I can't -- what I would propose to do would be, if the stay is extended at all, it would only be extended to the extent that it now exists. As I understand it, that solves Mr. Phillips' clients problems, because those things are proceeding.

MR. PHILLIPS: Right.

THE COURT: So, that doesn't affect him. Then, so, what I think may be helpful at this point is, you all talk about this amongst yourselves for the next week or so. If you

come up with a consensus of what you want to do, include it as part of this order, the order part that you're going to do. I'll probably do it as a separate order so that doesn't clutter up the -- but you can put it in the same thing and I can cut and paste it. It doesn't much matter.

But, anyway, include that in there which would state that the stay will be extended, as you all agree, subject to any party in interest moving to have it terminated in their particular case. And what you -- in that regard, what you might want to think about, though I'm cognizant of expense too and I don't want to have everybody come down here for status conference, after status conference, after status conference. It's no big problem for me to go to a status conference when I live right there. But, we may want to just have a temporary stay for 30 days, 60 days, and then a status conference at which point we see where we are at that point. That's a possibility.

If you all agree on some other proceeding, that would be certainly acceptable to me. And then, if we need to have a hearing -- I'm not really interested in briefly, quite frankly, because I --

MR. KAUFMAN: That was an unwise suggestion on my part.

THE COURT: Well, no, because I just don't --

MR. KAUFMAN: It was to avoid running down here, but

we got you.

THE COURT: Whether to -- how long to stay something, whether --

MR. KAUFMAN: I know.

THE COURT: I mean, that's not --

MR. KAUFMAN: It's not fascinating.

THE COURT: It's not helpful. I can't get -- I have to have a give and take and to really understand where the parties are to really make an intelligent decision on that.

MR. KAUFMAN: So, we'll report --

THE COURT: So, that's got to be either a telephone conference, which I'm happy to do if we can figure --

MR. KAUFMAN: Right.

THE COURT: There's a lot of people so that gets to be a problem if we have a lot of people, but I'm certainly happy to have -- to schedule a status conference and consider it that way, but I'm not real interested in -- as good as all your briefs were on the merits on this issue, I'm not real interested in briefing on whether -- how long to extend the stay.

MR. KAUFMAN: That's good.

THE COURT: Okay. Anything else we need to do today?

(No audible response)

THE COURT: Okay. Once again, I thank everybody.

MR. KAUFMAN: Thank you, Your Honor.

MR. MUNGOVAN: Thank you, Your Honor.

THE COURT: You all are excused.

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C E R T I F I C A T I O N

We, LORI AULETTA, AMY RENTNER, and CECILIA ASHBOCK, court approved transcribers, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, and to the best of our ability.

/s/ Lori Auletta
LORI AULETTA

/s/ Amy Rentner
AMY RENTNER

/s/ Cecilia Ashbock DATE: September 10, 2009
CECILIA ASHBOCK
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